

**SUPREME COURT PRINCIPLES
ON
BURDEN OF PROOF &
LEADING EVIDENCE**

RAO.S.H.

(UNDER INCOME - TAX ACT)

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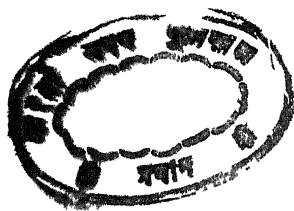
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DEDICATION

Shreeji Maharani Trust has been rendering useful service in this direction and previous publication has received success. This new publication on Income-tax legal principles has been written with the sole purpose of dedicating this book on the lotus feet of Shri Gurdeo so that the receipts are utilised for the charitable purposes particularly in serving and performing ceremonial functions of Radha Madho Temple, Old Kalidah, Vrindaban.

Please accept my humble present. I shall be obliged.

—*Surendrajit Singh*

PREFACE

This book is the second publication of Shreeji Maharani Trust of Vrindaban. It enunciates Legal Principles stated by the Supreme-Court on matters which were very controversial. The cases which have been selected for this book are those which are mostly decided under the Act of 1922 but which will found to be fully applicable in deciding the cases under the New Act of 1961. There are General Principles which govern the assessment, Leading Evidence, Burden of Proof, Nature of Enquiry, Final fact finding courts decision and Power of the High Court in Reference. All these controversial issues cannot be interpreted in two different ways whether the Act was old Act or it is the New Act. This book is of a permanent character and will be of great use to the readers whether they are practising in the Lower Courts or in the High Court.

It has become necessary to illustrate the purpose why this subject has been chosen for this book. 'ON LEADING EVIDENCE' and who should lead the evidence is explained hereunder with reference to some decisions of the Supreme Court taken as illustrations. The illustration has been chosen so as to explain that there have been different ways how the Supreme Court has decided the same issue in two different cases.

To elaborate this aspect it may be seen that the Supreme Court has given a warning on different occasions to the High Court that it cannot sit in appraisal of the evidence afresh.

In the case of 'Greaves Cotton & Co. Ltd., Ref. 68 I.T.R., page 200' refer pages 94, 120 and 150 of this book, the Supreme Court had to remand the case to the Income-tax Appellate Tribunal for re-hearing of the appeal simply because the question arising out of their judgment was a mixed question of law and fact and the Tribunal had not fully examined the evidence from all its aspects. The evidence before

the Appellate Tribunal in the form of the affidavit of the assessee and the fact that termination of the managing agency was going to be beneficial to the payer company were two important pieces of evidence which were overlooked by the Appellate Tribunal and, therefore, evidence already on record since was not fully examined the Appellate Tribunal's judgment was set aside. But in the case of 'Yogendra Nath Naskar v. C.I.T., Calcutta, Ref. 72 I.T.R., Short Notes page 5' see Note 12-Chapter XV-in which again High Court was given a warning. This time Supreme Court did not set aside the judgment of the Appellate Tribunal because the evidence on record had already been examined and the conclusions were drawn by the Appellate Tribunal in deciding the appeal of the assessee. Such conclusions were interfered by the High Court in Reference by appraising the evidence afresh and the Supreme Court said that the High Court cannot do so.

Therefore, placing all the evidence on record before the appeal is heard by the Appellate Tribunal and drawing the attention of the Appellate Tribunal in appeal before the hearing is concluded is very essential in view of this Principle of law stated by the Supreme Court of India in different cases. That how this subject 'ON LEADING-EVIDENCE' has become a matter of very great importance.

The importance of the subject and author's choice for selecting this topic will appear from the following para :

LEADING EVIDENCE

It is true to say that misfiling of the file and guarding of assessee's interest by leading proper evidence before the Revenue authorities is absolutely essential. Three basic principles will have to be remembered before the evidence is prepared and filed:-

1. Legal Principles involved in that issue.
2. The Book Entries with definite description of the Transaction.
3. The Burden of Proof on whom it lies.

It is not possible to lay down any hard and fast rule as to what should be the nature of the evidence in a given case. But initially giving of an explanation and making out a probable case the tax payer has to discharge his duty because the transaction and the surrounding circumstances are peculiarly within his special

(c)

knowledge. The tax collector is a cosharer in your profit though he does not visit your business house even once.

The three aforesaid Fundamental Principles may well be established by giving appropriate illustration. Three examples have been chosen for this purpose :—

1. Where Compensation is paid on premature Termination of the managing agency, whether it is allowable **Deduction** ?
2. Where an isolated Transaction of purchase and sale results in profit, whether it is **Taxable Income** ?
3. Where the income is shown by two separate legal persons, whether the same can be clubbed together in **One Assessment** ?

Taking up the first problem of deduction there are three judgments of the Supreme Court in this book viz., 'Greaves Cotton & Co.'s case, Ref. 68 I.T.R., page 200,' 'Lakshmirattan Cotton Mills case, Ref. 70 I.T.R., Short Notes page 37,' and 'Juggi Lal Kamlapat, Ref. 70 I.T.R., Short Notes page 39.'

One thing is clear that in 'Greaves Cotton & Co.'s case' the Supreme Court was influenced by the assessee's case that evidence already on the record was not fully examined by the Tribunal. The facts relating to the premature termination of the managing agency which was narrated in the affidavit and the genuineness of the transaction which had resulted in the positive gain to the company making the payment were sufficient in the eyes of the highest court of India to send back the case for re-examination of the evidence by the fact finding court.

Whereas in 'Lakshmirattan Cotton Mills's case' the two groups forming the managing agency having quarrelled, who were founders of the mill, payment of compensation to the managing agents on premature termination was held to be for extra commercial reasons so it could not be allowed as a deduction. Payment was found to be for the promotion of the mills and may not have been beneficial to the company making the payment. It was beneficial to one of the groups to whom the mill was delivered as a result of the award. So the judgment of the Supreme Court was that expenditure was not allowable.

(d)

Whereas in the third case of 'Juggi Lal Kamlapat' legitimate inference was drawn that payment was to get away with the tax by making an improper claim for deduction of an amount so paid on premature termination of the managing agency. It could well be said that it was a case of device.

Now turning to the second example of isolated transaction, there are three cases referred in this book. 'G. Venkataswami Naidu's case, Ref. Case No. 134,' 'Janki Ram Bahadur Ram's case, Ref. Case No 54-A & 136' and 'Saroj Kumar Mazumdar's case, Ref. Case No. 54' may be seen.

In the first case income is found to be taxable. In the second and third cases income is found to be not taxable. There are dozens of other judgments of the Supreme Court on this topic.

Following are the essential points on such a topic :—

1. Burden lies upon the Department to prove that it was a Transaction in which there were elements of trade.

2. Assessee has to establish the intention that purchase was made not solely with a view to resell the article at profit. The intention must be dominating or governing intention.

3. What assessee should prove is that primary object of purchasing the article was investment; or security of life; or pride of possession; or it was a potential source of revenue while one holds it. But the Department may have to demolish the case of the assessee by proving the intention and object of purchase.

HOW TO ESTABLISH INTENTION

The sole intention has got to be determined with reference to the surrounding circumstances in the transaction and the nature of the transaction itself. Now this determination can be with reference to the character of the assessee. It can be with reference to the article which he has purchased and sold. In an English decision in 'C. I. R. v. Fraser, Ref. 24 T.C., page 498,' it has been said that it is more important to determine the character of the transaction with reference to the article which he has purchased and sold rather than with reference to the assessee's character. In this case assessee had

purchased large quantity of whisky which was in excess of his personal requirements and family use. So the inference was obvious that the purchase of whisky was to sell it at profit. In this case transaction was held to be the adventure in the nature of trade.

Now taking the third illustration i.e. the clubbing of the income of two persons in one assessment the best is that of the Karta and his H.U.F. . One may see 'Dhanwatey's case, Ref. Case No.145' and 'Umacharan Shaw's case, Ref. Case No. 97' dealt in this book.

In 'C. I. T., West Bengal v. Kalu Babu Lal Chand, Ref. 37 I. T. R., page 123,' income of the karta by way of remuneration from the limited company was clubbed with H.U.F.'s income. Past history, no proof about the services of the karta to the limited company and merger of his salary income with the other income of the Hindu undivided family in the account books was responsible for this judgment. It was held, that karta's salary income was not independent of H. U. F.'s income.

Taking the cases where family is a partner in the firm and salary is paid by the firm to the karta two decisions of the Supreme-Court are guiding. In 'Dhanwatey's case - see page 17' clubbing was justified whereas in 'Shaw's case' Clubbing was not justified. The test is whether salary payment by the firm to the karta is in consideration of his services to the firm or it is in consideration of family's capital to the firm.

Therefore, it is plain and simple preposition before us that evidence on record will be the decisive factor for all the legal issues that follow on a particular subject.

In the end it is respectfully submitted that they should built up the case of the tax-payers long before it reaches the Tribunal and case should be taken to establish :—

- (a) That the transaction is genuine and real.
- (b) That there is no device or fraud applied for evasion of tax.
- (c) That the surrounding circumstances and the explanation should indicate that explanation is natural and probably true.
- (d) That the evidence so placed fits within the wheels of legal principle already enunciated by the Supreme Court on the subject.

(f)

(e) That the evidence must be consistant with the Book Entries.

(f) That in matters like this it is always a constantly shifting burden from assessee to the revenue and vis-a-vis a depending upon how you placed your case in the initial stage.

Therefore, the purpose of this book is to place before my readers the nature of the evidence which has been accepted by the Supreme Court as reliable. Also who should lead the evidence and prove the case. It is because when the case reaches the stage of the Tribunal new evidence may not be permissible. Secondly because if the point is not raised before the Tribunal assessee is completely shut out and there is no remedy. So it is hoped that this book will be of great help in understanding the Legal Principles enunciated by the Supreme Court which is the highest court of India in relationship to the essential facts of that particular case which will help the assessee to built up their cases and bring it within the pronounced decision of the Supreme Court already made.

No doubt the proceeds of the book is meant for charitable purposes and belong to a public charitable Trust who are its publishers, entire receipts will be spent on religious and charitable purposes in Shri Vrindaban Dham.

My very best thanks are due to Shri A. K. Agarwal M. Com., Sahityaratna, Income-tax Practitioner, my junior who has rendered valuable services in preparation of my work and particularly reading the proof and preparing General Index.

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Thanks.

—*Author*

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List of Abbreviations used for Journals

- A. C. — Appeal Cases (England)
- A. I. R. — All-India Reporter
- A. I. T. R. — Australian Income-tax Reports
- All E. R. — All-England Report
- App. Case — Appeal Cases
- C. A. — Calcutta Appeals
- C. L. R. — Calcutta Law Reports
- C. W. N. — Calcutta Weekly Notes
- Ch. D. — Chancery Division
- Comp. Case — Company Cases
- D. G. & J. — De Gex & Jones (England)
- E. R. — England Reports
- I. C. — Indian Cases
- I. L. R. — Indian Law Reporter
- I. T. C. — Indian Tax Cases
- I. T. R. — Income-tax Reports (India)
- K. B. — King's Bench (England)
- L. R. — Law Reports (England)
- M. P. L. J. — Madhya Pradesh Law Journal
- Q. B. — Queen's Bench (England)
- S. C. R. — Supreme Court Reports
- S. T. C. — Sales Tax Cases
- T. C. — Tax Cases (England)

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Book Entry

The significance of Book Entry is very important due to number of decisions given by the Supreme Court; laying emphasis upon the transactions evidenced by the entry in the Account Books. To illustrate, there can be a merger of one's income in the accounts of another and inference would follow that two incomes belong to same person. System of Accounting whether Mercantile or Cash has an important bearing to the taxability of an item appearing in the Account Books in one year or in another. Entry sometimes may represent Real Income and sometimes may be purely notional and may not represent income though credited in the Profit & Loss account. In this background decisions with reference to particular facts are examined.

Case No. 1

Accounts Incomplete

**Assessee relying upon Incomplete Accounts left by his father—
Not accepted.**

In Sovachand Baid v. C. I. T., Ref. 34 I. T. R., page 650.

Facts :— The Tribunal did not rely upon the account books produced by the assessee. The assessee contended that he inherited high denomination notes from his father. His father's account books were incomplete and the records for certain periods were missing and the books were of such a nature that they could have been written at any one time. Tribunal's view that possession of high denomination notes was not proved is fairly reasonable inference from the evidence aforesaid. (Case fully discussed infra —Chapter IV).

Case No 2

Account Rejection

Manufacturers maintaining production book and subsidiary registers of his Trade results—Rejection of Accounts not justified.

In Indore Malwa United Mills Ltd. v. State of M. P. & Others, Ref. 60 I. T. R., page 41.

Facts :— It appears that on account of shortfall in production from cotton to yarn and from yarn to cloth, the Assessing Officers rejected the account version of the assessee. They examined only one or two registers though assessee had produced a number of registers to prove the process of manufacturing at different stages. The Assessing Officer, Appellate Court and the High Court rejected the contention of the assessee for acceptance of his trading results. The High Court's judgment was reversed by the Supreme Court on the reasons that proper explanation with reference to entry in the account books has not been examined with care by the fact finding Court.

Following was the argument put forward by the Counsel of the assessee (at page 42) :

“The contentions of Mr. A. V. Vishwanath Sastri, Learned Counsel for the appellant, may be summarised thus : (1) Though all the relevant registers pertaining to the assessee's business were filed before the Assessing Officer and which, if closely scrutinized, would establish that the entire yarn produced had been accounted for, neither the Assessing Officer, the Appellate Authority nor the High Court rejected any of the account books on scrutiny, but relied only upon the two account books, namely, the Sale Contract Register, which only gives the nominal weight and the Daily Yarn Production Register, which gives an inflated version of production, and came to the conclusion that the difference found between the yarn produced as shown in the Yarn Production Register and that deduced from the Sale Contract Register was not accounted for by the assessee; this conclusion, the argument proceeded, was arrived at by ignoring the relevant evidence and relying upon irrelevant or at any rate inconclusive evidence. (2) The Sale Contract Register contains entries made even before the cotton was purchased; the entries only represent the estimate and are made on the basis of the quality and the quantity required by the buyer, and that they invariably show lesser than the

actual weight shown in the Actual Cloth Production Register. The Sale Contract Register, though it is relied upon for preparing the profit and loss account and for maintaining the opening and closing stocks, must, therefore, give place to the Cloth Production Register which gives the actuals."

Principles (at page 43) :

1. *The weight of the yarn spun is necessarily less than the weight of the cotton purchased. During the production of cloth, the yarn undergoes a process of sizing which adds to the weight of the yarn, but it also involves a certain loss of yarn in the form of waste that occurs in all the departments, i. e., winding, warping, sizing, drying-in, weaving and reeling. Many imponderables, therefore, enter into the process of spinning yarn and weaving cloth which reduce the weight of the yarn that finally enters into the making of the cloth.*

(at page 44):

2. *What is important is that any tribunal whose duty it is to ascertain the quantity of yarn produced has to consider all the relevant registers, accept or reject all or some of them for good and relevant reasons and come to the conclusion one way or the other on the basis of the accounts accepted by them and other relevant evidence. The tribunals in giving value to the entries in the registers, shall also consider the explanation and the reasons given by the assessee for the fluctuations found in the registers.*

(at page 44-45) :

3. *It was the duty of the authorities to definitely come to one conclusion or the other in regard to the reliability of every one of the relevant accounts filed by the assessee. In the absence of any such finding, it was not open to them to pick and choose some of the registers which were more favourable to the revenue. In choosing the Sale Contract Register, where only nominal weight was given, and ignoring the actuals register, they had accepted notional figures in preference to the actuals without holding that the actuals were not true figures.*

(at page 45) :

4. *Being tribunals of fact, it was their duty to consider all the accounts, having regard to the arguments advanced and the explanations given by the parties, and come to their own conclusion. But as they had*

not done so, we think that this is a fit case to give them another opportunity to do so.

Case No. 3.**Accrue**

Receivability of Income if disputed and Tribunal deleted the Amounts from the Assessment—Held question of law arises.

In C. I. T. Punjab v. Jai Parkash Om Parkash Co. Ltd., Ref. 52 I. T. R., page 23.

Facts :— There was certain forward contract and the purchaser tried to cancel the same. There was a telegram sent by the assessee that if within 4 hours if certain conditions were not acknowledged the contract will be treated as if gone through. There was no acknowledgement of the telegram. Assessee made entry in the account books crediting to the profits Rs. 94,253/- receivable on contract non-acquisition. The adjustment of the profit and its calculation was at the rate mentioned in the telegram. The Income-tax Officer included this amount as if profit accrued to the assessee in the year of account. When the entry was made the assessee had filed a suit in the Civil Court and got the decree in his favour for recovery of this amount. This Civil Judgment was still disputed in the High Court because opposit party had gone in appeal, the matter was subjudice when the assessment was made. Appellate Tribunal knocked off this amount from the assessment on the ground that no income accrued when the liability was still disputed in appeal and the decree was not admitted in the year of account. When the Department wanted a reference to be drawn, Tribunal refused it. C. I. T. moved the High Court for directing the Tribunal to state the case. High Court also rejected this application. Supreme Court said, whether a particular income could be assessed on the basis of accrual is purely a question of law and reference should be asked for. Since the High Court in disposing of the application of reference, made remarks to the effect that merely making an entry in the account books did not result in income accruing to the assessee is prejudging one issue before answering a question of law. This sort of judgment by the High Court without asking the Tribunal to refer the question to them is not advisable. High Courts' duty is not to predict in issuing a judgment without asking for a reference.

Case No. 4

Accrual

**Relinquishment of commission on a Date after Accounting Year
—There is no Real Income to the assessee.**

In C. I. T., Bombay-1, v. Messrs. Shoorji Vallabhdas & Co., Ref. 46 I. T. R., page 144.

Facts :— In this case 10% was the commission to be payable by the managed company to its managing agents i. e. the assessee. Entry was made by crediting in the books 10% commission receivable by the assessee. Subsequently, $7\frac{1}{2}\%$ was given up and only $2\frac{1}{2}\%$ was accepted as an amount receivable by the assessee for the period ending 31st. March, 1948. The decision to give up part of the commission was finalised in December, 1948, i. e. after the close of the accounting year.

Bombay High Court in its decision, 36 I. T. R., page 25.

Held, that the amount given up could not be the income of the assessee of the accounting year. Supreme Court has confirmed this judgment of the High Court and relied upon the following facts, namely.

36 I. T. R. (at page 25) :

1. "In the draft letter it was stated that the managing agents could not agree to a reduction in the remuneration already fixed but voluntarily agreed to a reduction in the commission to be fixed by agreement between the board and the company. On December 30, 1947, the M. S. Co. passed a resolution appointing S. V. Ltd. as their managing agents from January 1, 1948, for a term of 20 years. It was, however, only on December 30, 1948, when the annual general meeting of M. S. Co. was held that the commission of the assessee was fixed at $2\frac{1}{2}\%$ instead of 10% for the period April 1, to December 31, 1947."

(at page 26) :

2. "In the assessment for the year 1948—49 of the income of the assessee for the previous year ended March 31, 1948, the two sums of Rs. 1, 71, 885/- and Rs. 2, 56, 815/- entered in the books of account maintained on the mercantile system of accounting were brought to tax on the ground that they were earned and accrued to the assessee in the previous year, but the assessee contended

that the amounts were never received by the firm and did not represent the income of the firm."

Held, that the amount given up was not includable.

Principles (46 I. T. R., at page 148) :

1. *If income does not result at all, there can not be a tax, even though in book-keeping, an entry is made about a "hypothetical income," which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."*

(at the same page) :

2. *A mere book-keeping entry cannot be income, unless income has actually resulted, and in the present case, by the change of the terms the income which accrued and was received consisted of the lesser amounts and not the larger. This was not a gift by the assessee firm to the managed companies. The reduction was a part of the agreement entered into by the assessee firm to secure a long term managing agency arrangement for the two companies which it had floated.*

In our opinion, the High Court was right in coming to the conclusion that on the facts of this case the larger income neither accrued nor was received by the assessee firm.

Case No 5

Accrual

Amount given up after close of the Accounting Year—Not Real Income.

In H. M. Kashiparekh & Co. Ltd. v. C. I. T., Bombay North, Ref. 39 I. T. R., page 706.

Facts :— The assessee relinquished his right to receive commission from the Managed Company by passing book entries, after close of the accounting year. Assessee was entitled to Rs. 1, 17, 644/- but he accepted Rs. 20,644/- only, and the balance of Rs. 97,000/- and odd was given up. Following the earlier decision of *Bombay High Court in Shoorji Vallabhdas & Co.*, High Court repeated the

same principle that it is real income which must be brought to charge. Supreme Court has again approved this case in giving judgment in *Poona Electric Supply Company*, (57 I. T. R., page 521)

Principle of Law (at page 707) :

In ascertaining the real income the fact that the assessee followed the mercantile system of accounting did not have any bearing. The accrual of the commission, the making of the accounts, the legal obligation to give up part of the commission, and the forgoing of the commission at the time of the making of the accounts were not disjointed facts. There was a dovetailing about them which could not be ignored.

Case No. 6

Agent

Non-Resident's Commission credited with a statutory Agent Resident in India —The Amount rightly assessed

In Raghava Reddi and Another v. C. I. T., Andhra Pradesh, Ref. 44 I. T. R., page 720.

Facts :— The assessee was appointed a statutory agent of a Japanese concern. He was exporting mica, under trade relationship entered into with the Japanese concern. The commission to non-resident became due in the first period at 4% and in the second period it became due at 2%. This commission amount calculated accordingly was credited as commission payable to the Japanese concern in the books of the assessee in India. This was done according to the instructions received from the Japanese firm. The amount could not be remitted to Japan due to government restrictions. The commission credited in the account books of the assessee in favour of the Japanese concern was assessed as taxable income of the non-resident. The Appellate Tribunal decided that it was not taxable. High Court reversed the judgment of the Tribunal. Supreme Court affirmed the judgment of the High Court.

Principle (at page 720) :

That the legal effect of the directions given by the Japanese company was that, as soon as the assessee credited the amounts to the company in the assessee's accounts, the relationship between the parties ceased to be that of debtor and creditor; when the moneys were credited in the accounts they should be treated as moneys deposited by the Japanese company with

the assessee. The moneys were thus "received" by the Japanese company in India on the date when they were credited, and the assessee could be assessed as their statutory agent in respect of such moneys.

Case No. 7**Bad Debt**

Money lending transactions – Owned by one partner after Dissolution of the Firm—Held, claim for Bad Debt was permissible

In C.I.T. and E.P.T. Madras v. R. S. A. Sankara Ayyar, Ref. 20 I. T. R., page 597.

Facts :— In 1940 decree was obtained by the firm in a mortgage suit against a particular debtor. The firm consisted of two partners—one of them was the assessee who was the Manager of his H. U. F.. In 1942 the firm decided to discontinue the partnership business. Thereafter the assessee in his own account books entered half of the amount as money advanced to the debtor aforesaid, treating the amount to be his own money lending advance. Subsequently, there was a realisation of Rs. 4,000/- from the debtor. Rs. 2,000/- out of it was credited by the assessee in his own new books by making a suitable entry. The balance which he could not recover was written-off as bad debt.

Held, that bad debt was allowable.

Principle (at page 598) :

Affirming the decision of the High Court, that when the books of the partnership were closed and an account of M was opened in the assessee's books debiting him with the amount due from him to the assessee, M became a debtor of the new firm and the amount became a loan advanced by the assessee's money-lending business to M. Consequently the sum written-off as irrecoverable was an admissible deduction under section 10 (2) (xi).

Note :— The significance of Book entry is thus very important in as much as it has brought into existence an old money stock as if assessee's own stock-in-trade. Conversion of dead stock into stock-in-trade, or vice versa, is thus possible by making an entry in the accounts.

Case No. 8**Bonus Payment**

Insurance Company claiming Deduction of such Payment without adjusting same to Profit & Loss account—Yet allowable.

In Union Co-operative Insurance Society v. C. I. T., Bombay, Ref. 66 I. T. R., page 360.

Facts :— The appellant carried on general insurance business. Under its bye-laws bonus had to be paid on policies on which no claim had been made during the year for which insurance was made if the policy was renewed. For the calendar years 1956 and 1957, instead of showing the actual disbursement in the Profit & Loss Account (Form B), it had entered towards this bonus, in its Profit & Loss appropriation account (Form C), the estimated sums of Rs. 50,000/- and Rs. 70,000/- respectively, under the head, "Policy Holders Bonus Fund". For the corresponding assessment years 1957-58 and 1958-59, it, however, claimed deduction of only the sum of Rs. 29,615/- and Rs. 44,920/- which were paid towards the bonus, in computing its taxable income :

Held, that the payment was an adjustment on account of bonus and if no entry was made in the Profit & Loss account it could not affect the computation of taxable income where a particular amount is otherwise allowable according to law or scheme of the Insurance Company. The High Court was in error in attaching more importance on the entry made in 'B' Form, or in 'C' Form, or in Appropriation account, rather than to the substance of the matter. Since it was an expenditure permissible, it could not be disallowed merely because there was no entry made in the Profit & Loss Account.

Case No. 9

Cash System

**Advocates receipt of fees after discontinuance of Profession—
Not taxable.**

In Nalinikant Ambalal Mody v. S. A. L. Narayan Row, C. I. T., Bombay City-I, Ref. 61 I. T. R., page 428.

It has been stated by the Supreme Court that when an Advocate is elevated to the Bench and he maintains account on cash system and there are receipts of his professional period, which he received after the close of the profession, or after discontinuance of profession, such receipts are capital receipts and not income. It is purely because Advocate maintains the Account on Cash System.

Managing Agents liable to be assessed on commission—Receivable from the Managed Company, though adjusted to Suspense Account at the end of the Accounting Year.

In C. I. T., Madras v. K. R. M. T. T. Thiagaraja Chetty & Company, Ref. 24 I. T. R. page 525.

Facts :- The assessee who was the managing agent, became entitled to receive from the managed company commission of Rs. Two lakhs and odd in the year ending 31st. March, 1942. Due to some dispute regarding claim of a debt from the agents the company kept the commission in suspense account rather than crediting the agent's account. The company claimed the deduction of this amount payable to the assessee in their own assessment and the same was allowed. The Revenue authorities treated this income as that of the managing agents on the ground that they were adopting mercantile system and the income had accrued to them on 31st. March, 1942, when it became legally due and necessary entries were made in the account books of the company. Assessee was not keeping his own account books separate and his commission were all adjusted in the books of the company. Tribunal deleted the amount on the ground that assessee was adopting cash system in the past and so it could not be assessed. The entries had been passed through suspense account only. The High Court in reference observed that there was no material to justify the finding of the Tribunal that cash system was being adopted by the assessee. However, it confirmed the appellate judgment of the Tribunal on the ground that income did not accrue on 31st. March, 1942.

The Supreme Court reversed the judgment of the High Court.

Held :

- (a) There was no material in the finding of the Tribunal that cash system was being observed by the assessee in the past;
- (b) That income did accrue on 31st. March, 1942, though entries had been made in the account books of the company crediting suspense account only. Passing of the entry through suspense account do not affect accrual of income.

Case No. 11**Date**

In E. D. Sassoon & Company Ltd. and others v. C. I. T., Bombay-City, Ref. 26 I. T. R., page 27.

Facts :— The assessee named 'A' & Company, became the managing agents of 'U' Company on 31st. December, 1943. 'S' & Company were the Managing Agents. Under the agreement managing agency commission or remuneration was due only when annual accounts of the company were made up on 31st. March in each financial year. On 31st. March, 1943 the commission became due to the Managing Agents and 'A' & Company received the same as they were Managing Agents on that date. Contention was raised that 9/12 of this commission should be assessed in the hands of 'S' & Company and 3/12 should be assessed in the hands of 'A' & Company.

Held, that whole of this commission became due on accrual basis on 31st. March, only, and so 'A' & Company was liable for whole of it when the accounts were adjusted and credit given to the Managing Agents in the books of the company. It did not become due on 31st. December, 1943, when managing agency was transferred by 'S' & Company and 'A' & Co.

Principles (at page 28) :

1. *The right to receive the commission would arise and the income, profits or gains would accrue to the managing agents only at the end of the calendar year which was the terminus a quo for the making up of the accounts and ascertaining the net profits earned by the company.*

(at page 52) :

2. *A debt must have come into existence and he must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or a right to receive the payment or in other words a debitum in praesenti, solvendum in future it cannot be said that any income has accrued to him. The mere expression "earned" in the sense of rendering the services etc. by itself is of no avail.*

Case No. 12**Date**

Mercantile System—Receivability is not the test of Chargeability.

In C. I. T. (Central), Calcutta v. Moon Mills Ltd., Ref. 59 I. T. R., page 574.

Facts :—The company maintained accounts on mercantile system. On 6th August, 1948, its machinery, stock-in-trade, and buildings were destroyed by fire. It received Rs. 65 lakhs in March, 1950. This amount included Rs. 27 lakhs which was the income assessable under fictional provision of the Act. Question arose whether it should be assessed in the year 1949-50, i. e. in the period in which assets were destroyed, or in the subsequent year in which money was realised.

Held, it could not be assessed in the year 1949-50 because receipt of money was not in the calendar year 1948. Receivability of the money would not be equated to receipt of the income, because, if the amount is taxable by fiction, you cannot add another fiction and treat receivability as if amounting to receipt of income. Receivability is not the test of charge of tax. So, it was to be assessed in the year when the money was actually realised from the Insurance Company.

Case No. 13

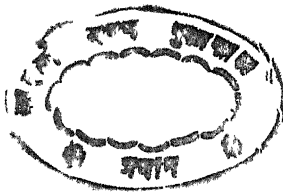
Date

Partnership Profits accrue or arose on the last Date of Accounting Year—No Apportionment of the Profits by Breaking the Accounting Year.

In C. I. T., Gujarat v. Ashokbhai Chimanbhai, Ref. 56 I T. R., page 42.

Facts :—'A', the manager of a Hindu undivided family held, on behalf of the family, a share of five annas in the rupee in the Profit and Loss of a firm. Under the partnership deed the accounts of the firm had to be adjusted every calendar year. On November 12, 1955, there was a partition in the family in which 'A' was allotted the five annas share in the firm and he became full owner thereof. Firm's accounts were closed on 31st. December, 1955. Revenue authorities claimed that 11 months profits of the firm were liable to be included in H. U. F.'s assessment.

Held, that the date of accrual of profit was 31st. December, 1955 and so the claim of the Department could not be sustained, as



H. U. F. did not become entitled to the profits for the broken period.

Principle (at page 45-46) :

The words "accrue" and "arise" are used to contradistinguish the word "receive". Income is said to be received when it reaches the assessee: When the right to receive the income becomes vested in the assessee, it is said to accrue or arise.

Note :— Principle of this case is similar to the case of *E. D. Sessoon & Co.*, Ref. 26 I. T. R., page 27.

'A' alone was the owner on the last date and so full accounting years profits were includable in his personal assessments.

Case No. 14

Date

Sale Price—Realisation in two subsequent Accounting Years—In which year Profit should be Assessed—Accounts maintained on Mercantile System.

In State of Kerala And Another v. Bhavani Tea Produce Company Ltd., Ref. 59 I. T. R., page 254.

Facts :— The assessee was an agriculturist and it delivered coffee to the Coffee Board. Payments were received in the subsequent accounting year. Question was, when the profits arose and earned by the assessee whether in the year when the sale was made, or when he received the money from the Coffee Board ?

Held, because assessee was maintaining account books on mercantile system, and because he made entry in his account books when he made the sale, profits were made prior to 1st. April, 1954, when he made the sale irrespective of the year in which he received the sale price.

Case No. 15

Dividends or Loans

Shareholder Initially credited as if Dividend Income—Subsequently entry made to convert that Dividend into a Loan—Yet, the Amount was Taxable.

In Kishinchand Chellaram & Others v. C. I. T., Bombay, Ref. 46 I. T. R., page 64.

Facts :—There was dividend declared by the company in an Ordinary General Meeting and as a result of it, four share-holders accounts were duly credited with the dividend income. Subsequently, through an Extra-ordinary resolution, company realised its mistake that the dividend had been declared without making a provision for the tax, and as such desired that dividend declared earlier in Ordinary Meeting be treated as loan to the share-holders. Entries were accordingly reversed in the books of the company. The assessee's (shareholders) moved an application for revising their own income-tax return on the ground and in the light of subsequent resolution of the company desiring that the dividend declared be treated as loan of the company.

Held, that violation of law by the company would not convert the dividend once declared to be a loan and the assessment of the shareholders was properly made by including dividend income.

Principle (at page 640) :

If a company has declared a dividend and the amounts payable to the shareholders as dividends have been credited or paid to the shareholders as dividends, it cannot alter the character of the credit or payment, by passing a subsequent resolution to treat the amounts paid or credited as loans, so as to alter the incidence of tax which attaches to the amounts credited or paid to the shareholders as dividend.

Note :—It would appear from the case of *Keshav Mills Ltd. v. C. I. T., Bombay*, Ref. 23 I. T. R., page 230, that originally a transaction of sale. would not be converted into another speceis that is loan and bring into existence the relationship of creditor and debtor by merely making an entry. The principle of law is stated in an English case *Morley (Inspector of Taxes) v. Tattersall*, Ref. 7 I. T. R., page 316—17; which runs thus :—

...the quality and nature of a receipt for income-tax purposes were fixed once and for all when the subject of the receipt was received; consequently, as the unclaimed balances, when first received, were obviously liabilities, no subsequent operation could turn them into trading receipts. They were not, therefore, assessable to income-tax.

In Morley's case facts indicated that there were certain unclaimed balances in the books of the assessee which he had to pay

to the creditors and depositors. Since depositors were not traceable he transferred the amounts to his capital account. Revenue authorities treated this transfer entry as if income. Deleting the amount from the assessment it was held, that once a liability in the balance sheet, it was always a liability and could not be treated income merely because book entry had been made.

Case No. 16**Expenditure**

Mercantile System-Deduction is Permissible of item which is debited in the Account Book though not incurred in the Year of Account.

In Calcutta Co., Ltd. v. C. I. T., West Bengal, Ref. 37 I. T. R., page 1.

Facts :— The assessee was a dealer in land. He had to develop plots and sell it under contract by charging 25% of the sale price and balance to be realised in instalment. From the date of contract within six month, he had to develop the property and deliver to the buyer. He realised in the year of account Rs. 29,000/—, and balance Rs.14000/- was credited in his account though not realised. Similarly he debited in the account Rs. 24,000/- being an estimated expenditure which he will have to incur in the subsequent year on the development. Revenue authorities disallowed this amount of Rs. 24,000/- on the ground that it was not expenditure permissible having not been incurred. The assessee's contention was that it was an accrued liability and was allowable. High Court did not agree with the assessee's contention on the ground that it was just a promise and not an expenditure. Supreme Court held in favour of the assessee on the ground that it was an accrued liability distinct from contingent liability.

Principles (at page 8) :

1. The expression "profits and gains" has to be understood in its commercial sense and there can be no computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipts is deducted therefrom-whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future date.

(at page 6)

2. *Simon in his Income Tax, second edition, volume II, at page 204, under the caption "Accrued Liability" observes as under, after citing the case mentioned above :*

In cases, however, where an actual liability exists, as is the case with accrued expenses, a deduction is allowable; and this is not affected by the fact that the amount of the liability and the deduction will subsequently have to be varied. A liability, the amount of which is deductible for Income-tax purposes, is one which is actually existing at the time of making the deduction, and is distinct from the type of liability accruing in Peter Merchant Ltd. v. Stedeford (Inspector of Taxes), 30 T.C. page 496; which although allowable on accountancy principles, is not deductible for the purposes of Income-tax.

Note :— 1. Supreme Court has drawn a distinction between accrued liability and a contingent liability holding that later is not allowable because it depends upon the happening of certain events. First type of liability is allowable under section 10 (1) of the Income-tax Act in computing profits on commercial basis.

2. Supplement to the book '*Supreme Court Principles on Deduction under Income Tax Act*' may be seen in respect of contingent liability. Problems discussed at pages 23, 27, 41 & 51 of the said book.

Case No. 17

H. U. F.

Merger of Income of Karta in H. U. F. Account may make H. U. F. liable for such Income.

In C. I. T., West Bengal v. Kalu Babu Lal Chand, Ref. 37 I.T.R., page 123.

Facts :— Remuneration was receivable by the Karta from a Limited company of which he was the managing director. Hindu undivided family had promoted the company with its funds. In past years the income was included in H. U. F. . The income of the Karta was merged with other income of the family in the account books.

Held, Profits in the hands of the Karta as managing director of the company was liable to be included in the H. U. F.'s assessments. The company or the outside world is not concerned whether it is the income of the Karta, or through the Karta, that of his H. U. F. because H. U. F. funds having been utilised by the Karta. There was strong presumption against the assessee, and inclusion of the amount in the H. U. F.'s case was justified.

Note :— But in the case of *S. Rm. CT. Pl. Palaniappa Chettiar v. C. I. T., Madras, Ref. 68 I. T. R., page 221*, a different decision was given by the Supreme Court in which they held, that the income of the Karta had no direct link with the investment of the family funds in the company, and *Kalu Babu Lal Chand's case* was distinguishable, on the ground that there was no direct link between the investment and the income of the Karta. The income of the Karta could not be included in H.U.F.'s assessment. But in *M.D.Dhanwatey v. C. I. T., Ref. 68 I. T. R., page 385*; Karta's income was includable in H. U. F.'s assessment. So the test is finance and surrounding circumstances like merger of Karta's income in H. U. F.'s account.

Case No. 18

Interest

Where Interest is credited in the Books of Head Office (British-India) and debited in the Books of the Branch (Native State)—Books on Mercantile System, Income does Accrue.

In Indermani Jatia v. C. I. T., U. P., Ref. 35 I. T. R., page 298,

Facts :— Assessee who was the resident of British India carried on business at 'K' and 'A' in British India had a branch in a native state at 'C'. Advance of money made by Head Office to its branch was subject to the charge interest. So in the Head Office books interest account was credited and branch accounts were debited. In the native state, interest account was debited and Head Office account was credited. This interest amount was included in the assessment of the assessee on the ground that assessee was keeping books on mercantile system and interest income had arisen as soon as entries were made. Assessee's contention was that he could not be assessed because it was a transaction between self and trading with self cannot give rise to profit. That further there was no income received from the native place and none was includable.

Held, that the assessee had conceded before the Tribunal that he was maintaining accounts on mercantile system and advance to 'C' was subject to charge of interest, so he could not raise a new point and take a plea that it was a transaction with self and so not taxable. Also he could not raise a new point that there was no remittance of income, so income from native state was rightly assessed. If a new point was allowed to be argued, the whole case will have to be reopened which could not be justified in the present circumstances.

Principle (at page 302-03) :

It is well known that the mercantile system of accounting differs substantially from the cash system of book-keeping. Under the cash system, it is only actual cash receipts and actual cash payments that are recorded as credits and debits; whereas, under the mercantile system, credit entries are made in respect of amounts due immediately they become legally due and before they are actually received; similarly, the expenditure items for which legal liability has been incurred are immediately debited even before the amounts in question are actually disbursed. Where, accounts are kept on mercantile basis, the profits or gains are credited though they are not actually realised and the entries thus made really show nothing more than an accrual or arising of the said profits at the material time. The same is the position with regard to debits made.

Case No 19

Interpolation Of

In Lalchand Bhagat Ambika Ram v. C. I. T., Bihar & Orissa, Ref. 37 I. T. R., Page 288.

Facts :— When high denomination notes Demonitization Ordinance came into force in 1946, the assessee who had huge cash balances, in sheer nervousness, made certain entries in his 'Rokar' indicating cash items receipts in high denomination form. The Department treated this subsequent entry as if it was a case of interpolation. The Supreme Court accepted the explanation of the assessee that they were made in sheer nervousness. The effect is that if subsequent entry does not alter the original character of a transaction indicated in the account books, it is not a case of interpolation.

(Case fully discussed in Chapter V 'Evidence & Explanation')

Case No 20**Merger**

Bad Debt claim not justified if Time Barred—Debt merged with Good Debts.

In Bank of Bihar Ltd., Patna v. C. I. T. Bihar and Orissa, Ref. 45 I. T. R., page 427.

(Case discussed in the Chapter – ‘High Court’s Jurisdiction’)

Principle (at page 427) :

If a debt has become bad, subsequent amalgamation of that debt with other debts due from the same debtor which had not become bad, could not revive the bad debt so as to enable the creditor to write it off as a bad debt in a later year.

Case No. 21**Merger**

Where in Account Books Entries are merged, Assessee must discharge the Burden and establish his Case.

In C. I. T., Kerala v. Joseph John, Ref. 67 I. T. R., page 74.

(This case discussed in chapter II—‘Onus & proof’)

Note :— In this case, it is found from facts that Vaida transaction, hedging transaction and speculative accounts were merged into one account. Assessee was to discharge the burden to prove that the losses were not speculation losses but regular hedging losses.

Case No. 22**Real Income**

Interest Appropriated to the Account of A. O. P. — It is not the Real Income if Association has suffered a Loss—Mere distribution and adjustment of Profits or Losses between members inter-se is not Income.

In C. I. T., M. P., Nagpur and Bhandara v. Kaloo Ram Govind Ram, Ref. 57 I. T. R., page 630.

Facts :— Two Hindu Undivided Families formed an association of persons. They incurred heavy losses in one year. The association in its books apportioned the net loss between the two members after debiting interest on capital payable to the members

of the Association on their capital contribution. In making the assessment of the Association interest was allowed as deduction. In making assessment of the members, this interest receivable from the Association was included, but the loss suffered by the members in the said Association was ignored. Question arose whether the entry made in the books of Association crediting members with interest receivable was rightly included in their respective assessment.

Held, the mere fact that in making the assessment of the A.O.P., there was a deduction of interest payable to the members; the mistake can not be perpetuated. That it does not follow that it became taxable income of the members. It could not be included in the respective assessment.

Principles (at page 631) :

1. *that the entries posted in the books of account of Govindram Sugar Mills were merely book entries and were not conclusive of the question whether the respondent had become entitled to the sum.*
(at the same page) :

2. *In the view of the High Court the credit entry on account of interest in favour of the respondent for an amount less than the respondent's share of loss in the business must be regarded as a mere book entry and "having regard to the substance of the matter, there was no real income in the shape of interest on the capital invested in the business."*
(at page 632) :

3. *Debit entries in the books of account of the association relating to interest deemed payable on investments were posted, but it could not as a matter of law be inferred therefrom that any part of the income of the association was distributed. The share of the respondent in the loss suffered by Govindram Sugar Mills was considerably in excess of the amount of interest debited as payable in the respondent's account with the association. Entries relating to interest payable to the two members of the association were posted merely for apportionment of part of the loss suffered by the sugar mills; they represented no real income to the two members.*

Case No. 23

Refundable Deposit

Amount received as Deposit from Customer if it is to be refunded at any Future Date, it is not Real Income and should not be Taxed.

In Poona Electric Supply Co., Ltd. v. C. I. T., Bombay City-1, Ref. 57 I. T. R., page 521.

Facts :—Entries were made in the account books showing receipt from depositors. Actually these amounts deposited with the assessee were refundable in future. Revenue authorities thought that this credit entry represented income includable. The assessee claimed that because it is refundable in the subsequent year and so it is not income. To illustrate this problem that it is not taxable, Supreme Court held, that there is no legal difference between one person crediting in his books the profits which is the real profit by 'X' and the other person crediting in his books 'X' + 'Y' and refunds the figure 'Y' in the subsequent year. In both the cases, the taxable profit will be 'X' and not 'X' + 'Y'.

Principle (at page 525-26) :

The real profit of a business man under section 10(1) of the Income-tax Act cannot obviously include the amounts returned by him by way of rebate to the consumers under statutory compulsion. it is as if he received only from the consumers the original amount minus the amount he returned to them. In substance there cannot be any difference between a businessman collecting from his constituents a sum of Rs. Y in addition to Rs. X by mistake and returning Rs. Y to them and another businessman collecting Rs. X alone. The amount returned is not a part of the profits at all.

Case No. 24

Sale Deed

Sale Deed is essential—Mere Book Entry is not Sufficient.

In Alapati Venkataramiah v. C. I. T., Hyderabad, Ref. 57 I. T. R., Page 185.

Facts :—The assessee agreed to transfer land, building and stock to a Company on 17th. March, 1948. It took steps to deliver possession to the Company. The sale consideration of Rs. 2 lakhs was shown in the books of the Company crediting the assessee, and corresponding entries made in the books of the assessee debiting the Company. Title Deeds were registered transferring the immovable property sometime in Nov. 1948. Directors Meeting was held sometime in 1949. The directors approved the action of purchase of immovable property in their aforesaid meeting. Question was whether delivery of possession and making of book-

entry amounted to sale of the capital assets i. e. immovable property which occurred before 31st. March, 1948; so that the amount could be assessed as capital gains in assessment year 1948-49.

Held, no capital gains arose on the immovable property as title deeds were not executed before Nov., 1948.

Principles (at page 192) :

1. *Before section 12B can be attracted, title must pass to the company by any of the modes mentioned in Section 12B, i.e., sale, exchange or transfer. It is true that the word "transfer" is used in addition to the word "sale" but even so, in the context transfer must mean effective conveyance of the capital asset to the transferee. Delivery of possession of immovable property cannot by itself be treated as equivalent to conveyance of the immovable property.*

(at the same page) :

2. *the entries made in the account books of the assessee and the company on March 20, 1948, but the date of sale or transfer according to section 12B is the date when the sale or transfer takes place, and it seems to us that the entries in the account books are irrelevant for the purpose of determining such a date.*

(at page 193) :

3. *The position regarding goodwill is however different. It is an intangible asset and it ordinarily passes along with the transference of the whole business. It cannot be said in the circumstances of this case that the goodwill was transferred before April 1, 1948.*

Case No. 25

Sale

Partners' Account adjusted on Dissolution of the Firm—Held, it was merely an Adjustment and not a Transfer or Sale.

In C. I. T., M. P., Nagpur and Bhandara v. Dewas Cine Corporation, Ref. 68 I. T. R., page 240.

Facts :— Two partners brought two picture-houses together in a firm to form the partnership. Sometime later, there was dissolution and the two houses were returned back to each of its respective partners on the original cost. The Department treated that the book entry of returning the two cinema houses to the two original partners on dissolution was a sale. Therefore, he included Rs. 44,308/- as

recoupment of depreciation already allowed to the firm and taxed it as income.

Held, that the adjustment entry in the account books of the firm was neither sale nor transfer. It was return of assets to the partners on dissolution. Therefore, there was no profit which could be assessed on the grounds of excess realisation on sale of depreciable asset of the firm. The amount of the written down value was something notional but not income.

Book entry showing return of assets cannot be interpreted to mean sale or transfer.

Principle (at page 243) :

The expressions 'sale' and 'sold' are not defined in the Income-tax Act : those expressions are used in section 10 (2) (vii) in their ordinary meaning. 'Sale', according to its ordinary meaning, is a transfer of property for a price, and adjustment of the rights of the partners in a dissolved firm is not a transfer, nor it is for a price.

Case No. 26

Stock-in-Trade

Withdrawal of Stock from Trade for alleged Personal use if not proved would be included for Assessment purposes at Market Rate—Situs of Accrual will be Business Place.

In Chainrup Sampatram v. C. I. T., West Bengal, Ref. 24 I. T. R., page 481.

Facts :—Assessee was carrying on business at Calcutta. 'A' and 'B' two brothers were partners. Business was in bullion and silver. 500 and odd bars of silver were withdrawn in 1941 by two partners by debiting in the accounts and showing withdrawal of stock-in-trade for personal use. The Stocks were removed to Bikaner their native place. The withdrawal of stock was valued at cost. Though valuation system was to value closing stocks at the market-rate. Revenue authorities treated the withdrawal of stock for personal-use as if a fictitious story. They accordingly valued these stocks of silver bars removed to Bikaner as if stock-in-trade on the last date of the accounting year and revalued it at the market price. Thereby the profit was increased by Rs. 2,20,887/- on revaluation. The Appellate Tribunal held that circumstances and the period of panic during which a number of Marwaris were withdrawing their stocks

and taking it to their native place all lead to one conclusion that story of personal use was false and not at all genuine. High Court also answered the question against the assessee.

Held, that debit entry withdrawing stock was not proved. Therefore, its market value was rightly taken as if it was a closing stock of the business. That even though stocks were kept in Bikaner in Indian State profits were still liable to be assessed at Calcutta their place of business.

Case No. 26-A

Note—But in another case namely *Sir Kikabhai Premchand v. C. I. T. (Central), Bombay, Ref. 24 I. T. R., page 506*, a different view has been expressed by the Supreme Court where it has been **Held, that Withdrawal of Stock for Personal use and later put it in the Trust was not an item on which Profit can be assumed and assessed.**

Facts :—Assessee was the sole proprietor dealing in silver, bullion etc. It also possessed shares and securities. It maintained accounts on mercantile system. It used to value the stocks at the close of the year on cost and not on market price. He withdrew some stocks of silver and shares and threw them in a Trust of which he was the Managing Trustee. The withdrawal was shown by debiting the entry in the account books at cost. Revenue authorities treated the withdrawal as if resulting in profits and they valued it at market price and included that alleged notional profits in the assessment. Tribunal and High Court confirmed the action of the Revenue authorities.

Held, no profits have accrued to the assessee on withdrawal of stocks for personal use. Future potential advantage is not taxable.

Principles (at page 512) :

1.no income arose to the appellant as a result of the transfer of the shares and silver bars to the trustees.

(at page 509) :

2.the business made no profit or gain, nor did it sustain a loss, and the appellant derived no income from it. He may have stored up a future advantage for himself but as the transactions were not business ones and as he derived no immediate pecuniary gain the State cannot

tax them, for under the Income-tax Act the State has no power to tax a potential future advantage.

(at page 508-09) :

3. . . .for income-tax purposes, each year is a self-contained accounting period and we can only take into consideration income, profits and gains made in that year and are not concerned with potential profits which may be made in another year any more than we are with losses which may occur in the future.

(at page 509) :

4. It is well recognised that in revenue cases regard must be had to the substance of the transaction rather than to its mere form.

Case No. 27

Transaction

**Non-resident selling goods in British India through Agents—
Liable to be assessed.**

In Keshav Mills Ltd. v. C.I.T., Bombay, Ref. 23 I. T. R., page 230.

Facts:-Assessee is a non-resident company in Baroda. It manufactures goods at Baroda. It has got guarantee brokers who do business on behalf of the company in British India. Modus operandi of sale indicates three types of sales proceeds i. e.:-

1. Sale proceeds recovered through
M/s. Jagmohandas Ramanlal & Co. ... Rs. 12,68,480/-
2. Sale proceeds through British Indian
banks and shroffs received by means of
drafts or hundies drawn on by the company... Rs. 4,40,878/-
(Railway receipts handed over to British
Indian merchants by the banks on payments)
3. Sale proceeds received by cheques on
British Indian banks and hundies on
British Indian shroffs and merchants,
and collected by the banks and shroffs. .. Rs. 6,71,735/-

Total .. Rs. 23,81,093/-

The Income-tax Officer, A. A. C. and Tribunal expressed different views in respect of different items referred, 1, 2, 3 above.

High Court held that profits in respect of sales under items (1) and (2) were taxable in British India on the basis of receipts of money either through the Bank or through the agent in British India. On item (3), the case was remanded to the Tribunal for supplementary statement. Before the Supreme Court regarding book entry the arguments advanced by Mr. Kolah was thus. (at page 238) :

..... that the accounts of the company were kept on the mercantile or book profit basis under which the accrual of profit as shown in the account was the criterion of taxability and Section 4 (1) (a) had no application at all; (b) that it was obligatory on the authorities under Section 13 of the Act to accept that system of maintaining accounts except under the proviso to that section and that the method of computation there was made the very basis of chargeability and Section 10 read with Section 13 operated to save these amounts from chargeability and (c) that the amounts having been treated as received when credit entries were made in the books of account and chargeability having crystallised on the date when the income accrued or was treated as received, there was no further scope for a charge when the amounts were subsequently actually received and the subsequent handling of the amounts by the company and the receipt thereof in British India were of no consequence.

Mercantile system has been explained by the Supreme Court thus. (at page 239) :

That system brings into credit what is due, immediately it becomes legally due and before it is actually received and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed. The profits or gains of the business which are thus credited are not realised but having been earned are treated as received though in fact there is nothing more than an accrual or arising of the profits at that stage. They are book profits. Receipt being not the sole test of chargeability and profits and gains that have accrued or arisen or are deemed to have accrued or arisen being also liable to be charged for income-tax the assessability of these profits which are thus credited in the books of account arises not because they are received but because they have accrued or arisen.

Once a sale always be a sale, and it cannot be converted into relationship of debtor or creditor. It will always remain the

relationship of vendor and vendee. Therefore, High Court judgment was confirmed by the Supreme Court on the following :—

Principles (at page 240) :

1. *What was in its inception a transaction of sale and purchase is not converted into another transaction as between creditor and debtor.*

(at page 241) :

2. *In all the cases which we have mentioned above the profits earned were credited in the books of account according to the mercantile system of accounting were at best “treated as having been received” which is neither “received” nor “deemed to be received” and therefore not within the purview of Section 4 (I) (a).*

Note (Undisclosed Source) :— Cash deposits and High Denomination notes have been treated as income from undisclosed source, mostly depending upon the Book Entry made by the assessee and could not be fully proved to be genuine deposit of capital. This subject has been more exhaustively dealt in Chapter 2—‘*Onus & Proof*’ heading ‘High Denomination Notes, and heading ‘General Principles’. Some other cases on this topic have been decided by the Supreme Court which appear in Chapter 5—‘*Evidence and Explanation*’.

2

Onus & Proof

The technic of the Evidence Act though is not fully applicable to proceedings under the Income-tax Act yet the principles relating to burden of proof and on whom the onus lies is more or less the same as in Civil proceedings. General principle is that onus lies upon the person to prove the fact which he has alleged. That Revenue authorities have to establish the charge of tax upon the subject before imposing it. Assessee must establish if he claims that a particular receipt in his hands is exempt from tax. Entry in the account books is a matter especially in the knowledge of the assessee and so burden is upon him to establish its character; otherwise the presumption would be against him. Probability of the case from the view point of an ordinary prudent person may have to be accepted unless Department can lay hand upon better evidence to reject it. These principles have been stated by the Supreme Court in various decided cases which are discussed hereunder :

Case No. 28

Account book rejection

Account version can be rejected—If the Maintenance of Account Books is irregular.

In S. N. Namasivayam Chettiar v. C.I. T., Madras, Ref. 38 I. T. R., page 579.

Facts :—The assessee, a resident, carried on extensive trade in Colombo in grains, fodder, gram and other foodstuffs for cattle and poultry. In the years under dispute his turnover disclosed was

Rs. 17,74,825/-. The profits shown were low i. e. $3\frac{1}{2}\%$ only. They were less than shown in the preceding year. The Tribunal disbelieved the account books for reasons :

- (i) Vouchers for several purchases made in Colombo had not been produced and for purchases of over Rs. 3 lakhs no vouchers were forthcoming and without the vouchers the entries in the account books could not be verified.
- (ii) There was no quantitative tally for the grains and for other materials purchased by the assessee and it was not possible to accept the books of account, where the turnover was as large as Rs. 17 lakhs without a quantitative tally.
- (iii) A fairly big sum of money was alleged to have been paid towards purchasing of licences for export from India; and Rs. 19,000/- worth of purchases were made in Tuticorin when only a small sum of money in cash was shown in the assessee's accounts.
- (iv) Several outsiders cheques had been entered in the accounts of the assessee without any proof as to why those cheques were paid to the assessee.
- (v) A fairly big sum of money had been invested in India in the purchase of property without money being received from Colombo.

Held, that the Tribunal was justified in rejecting the account and estimating profits. It was a case based upon facts. The Tribunal was the proper authority to decide on evidence which assessee failed to establish that his books be accepted.

Case No. 29

Account book Rejection

Account Books of the Head Office incomplete and there was suppression of Sale—No Inference possible that Branch Books were also incomplete – Burden for rejection on the Department.

In State of Kerala v. C. Velukutty, Ref. 60 I. T. R., page 239.

Facts :— The assessee was assessed on the basis of book turnover under Sales Tax Act. It had one Head Office and a few branches. By surprised visit the Revenue authorities of the Sales Tax Department discovered suppression of sales in the Head Office.

The ratio and proportion of suppression was at 100% to 135% of the disclosed turnover. Thereupon they made subsequent assessment on the basis of best judgment and rejected Head Office as well as Branches' accounts. In Branches they had applied 200% to 500% ratio for determining the suppression of the turnover.

Held, that the action of the Department was capricious and cannot be sustained.

Principles (at page 244-45) :

1. *Can it be said that in the instant case the impugned assessment satisfied the said tests? From the discovery of secret accounts in the head office, it does not necessarily follow that a corresponding set of secret accounts were maintained in the branch office, though it is probable that such accounts were maintained. But, as the accounts were secret, it is also not improbable that the branch office might not have kept parallel accounts, as duplication of false accounts would facilitate discovery of fraud and it would have been thought advisable to maintain only one set of false accounts in the head office. Be that as it may, the maintenance of secret accounts in the branch Office cannot be assumed in the circumstances of the case.*

(at page 244) :

2. *Under section 12 (2) (b) of the Act, power is conferred on the assessing authority in the circumstances mentioned thereunder to assess the dealer to the best of his judgment. The limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess-work in a "best judgment assessment", it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub-section (2) of section 12 of the Act provides for a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard for the available material.*

Case No. 30

Agricultural Income

Department should have Established that so much was the Income from spontaneous growth and was Taxable being Non-Agricultural.

In C.I.T., West Bengal, Calcutta v. Raja Benoy Kumar Sahas Roy, Ref. 32 I. T. R., page 466.

Facts :— The Tribunal submitted a statement of case from which the following facts appear as admitted or established :

The staff is employed by the assessee to perform the following specific operations :

- (a) Pruning,
- (b) Weeding,
- (c) Felling,
- (d) Clearing,
- (e) Cutting of channels to help the flow of rain water,
- (f) Guarding the trees against pests and other destructive elements,
- (g) Sowing of seeds after digging of the soil in denuded areas.

The Tribunal found that the employment of human labour and skill in items (a) to (f) was necessary for the maintenance and up-keep of any forest of spontaneous growth. Regarding item (g), however, it found that the said operation had been performed only occasionally and over a small fraction of the area where the original growth had been found to have been completely denuded. Such occasions were, however, few and far between, the normal process being that whenever a tree was cut, a stump of about 6" height was left intact which sent forth offshoots all round bringing about fresh growth in course of time. This went on perpetually unless an area got otherwise completely denuded.

Held, that the Department should have established when they were assessing that the income was from spontaneous growth and not as a result of human skill and labour.

Principles (at page 508) :

... the primary sense in which the term agriculture is understood is agar—field and cultra—cultivation, i. e., the cultivation of the field, and if the term is understood only in that sense agriculture would be restricted only to cultivation of the land in the strict sense of the term meaning thereby, tilling of the land, sowing of the seeds, planting and similar operations on the land. They would be the basic operations and would require the expenditure of human skill and labour upon the land itself. There are

however other operations which have got to be resorted to by the agriculturist and which are absolutely necessary for the purpose of effectively raising the produce from the land. They are operations to be performed after the produce sprouts from the land, e. g., weeding, digging the soil around the growth, removal of undesirable undergrowths and all operations which foster the growth and preserve the same not only from insects and pests but also from degradation from outside, tending, pruning, cutting, harvesting and rendering the produce fit for the market. The latter would all be agricultural operations when taken in conjunction with the basic operations above described, and it would be futile to urge that they are not agricultural operations at all.

(at page 509) :

2. but must be understood as comprising all the products of the land which have some utility either for consumption or for trade and commerce and would also include forest products such as timber, sal and piyasal trees, casuarina plantations, tendu leaves, horra nuts etc.

Case No. 31

Agricultural Income

Whether it is Agricultural Income — Assessee should discharge Onus.

In C. I. T., Bihar and Orissa v. Ramakrishna Deo, Ref. 35 I. T. R., page 312.

Facts :— The respondent is the proprietor of the impartible Zamin of Jaipur in Koraput District. The estate is of the area of 12,000 sq. miles of which 1,540 sq. miles are reserve forest and 100 sq. miles, protected forest. The respondent derives income from the forests by the sale of timber such as teak, salwood, lac, myrabolam, tamarind, cashewnuts and firewood.

The question arose whether forest income is agricultural income exempted from tax under Income-tax Act.

Held, that in the present case, the assessee did not discharge burden to prove that it was an agricultural income so the exemption was not established.

Principle (at page 316) :

At the very outset, we should dissent from the view expressed by the learned Judges that the burden is on the Department to prove that the

income sought to be taxed is not agricultural income. The law is well settled that it is for a person who claims exemption to establish it, and there is no reason why it should be otherwise when the exemption claimed is under the Income Tax Act.

(at page 317) :

On the merits, the question what is agricultural income within section 2 (i) of the Act is the subject of a recent decision of this court in Commissioner of Income-tax v. Raja Benoy Kumar Sahas Roy. There, it was held that before an income could be held to be agricultural income, it must be shown to have been derived from land by agriculture or by one or the other operations described in clauses (i) and (ii) of section 2 (I) (b) of the Act, that the term "agriculture" meant, in its ordinary sense, cultivation of the field, that in that sense it would connote such basic operations as tilling of the land, sowing of trees, plantation and the like, and that though subsequent operations such as weeding, pruning, watering, digging the soil around the growth and removing undergrowths could be regarded as agricultural operations when they are taken in conjunction with and as continuation of the basic operations mentioned before, they could not, apart from those operations, be regarded as bearing the character of agricultural operations.

"It is only," observed Bhagwati, J. delivering the judgment of the court, "if the products are raised from the land by the performance of these basic operations that the subsequent operations attach themselves to the products of the land and acquire the characteristic of agricultural operations....."

"But if these basic operations are wanting the subsequent operations do not acquire the characteristic of agricultural operations."

Dealing with trees which grow wild, Bhagwati, J., observed :

"It is agreed on all hands that products which grow wild on the land or are of spontaneous growth not involving any human labour or skill upon the land are not products of agriculture and the income derived therefrom is not agricultural income. There is no process of agriculture involved in the raising of these products from the land."

Case No. 32

Agricultural Income

Agricultural Income if Exempt—Assessee must prove the facts by placing Evidence on Record—Milk sale was not Agricultural Income.

In C. I. T., Madras v. R. Venkataswamy Naidu, Ref. 29 I. T. R., page 529.

Facts :— The assessee, a Hindu undivided family, owned about 70 acres of agricultural land at Perur near Coimbatore. It also maintained in the estate 65 cows and 10 pairs of bulls. During the accounting year 1945-46, it received Rs. 28,000/- from the Co-operative Milk Supply Union at Coimbatore to which it sold the milk of these cows. The assessee claimed that this income of sale of milk was exempt being agricultural income. High Court accepted the contention on the ground that there was no material to support that it was not agricultural income. Supreme Court accepted the appeal of the Commissioner and reversed the High Court's judgment.

Held, that regularity with which milk was sold clearly indicated that it was a commercial transaction with a view to make profit.

Principle (at page 534) :

They rightly placed the burden of proof on the assessee but the High Court erroneously framed the question in the negative form and placed the burden on the Income-tax Authorities of proving that the income from the sale of milk received by the assessee during the accounting year was not agricultural income. In order to claim an exemption from payment of income-tax in respect of what the assessee considered agricultural income, the assessee had to put before the Income-tax Authorities proper materials which would enable them to come to a conclusion that the income which was sought to be assessed was agricultural income. It was not for the Income-tax Authorities to prove that it was not agricultural income.

Case No. 33

Benami Ownership

Title Deeds being in the name of the wife – Department should discharge the Onus that she is Benamidar of her Husband—Cash Deposit in the name of wife in the Books of H. U. F.—Husband should discharge the Onus that wife is the real owner.

In Sova Ram Jokhi Ram v. C. I. T., Bihar and Orissa (The Patna High Court Decision) Ref. 12 I. T. R., page 110.

Facts :— Only two facts were placed before the Revenue authorities, viz. that title deeds of immovable property were in the

name of the wife and that the credit balance in the business books stood in the name of the wife since several years. Question was who should discharge the burden to establish benami ownership. Law has been stated by the Patna High Court almost correctly that where title deeds stand in the name of the lady, her husband or the H. U. F. of which her husband is the Karta cannot be assessed on that property income unless the Department can discharge the burden of proof and establish that she was the benamidar. But where the money in the name of the wife is deposited in the business books and past history show that interest credited to the said deposit was added in the family's assessment, the burden of proof was on the assessee that wife was the real owner of the money deposits.

Note :— It is a case of the general legal principle that control of the money was with the H. U. F. and the Karta was carrying on the business. So they had to discharge the burden regarding entry in the account books.

Case No. 34**Benami Ownership**

Husband and Wife—Ownership in the name of Wife—Revenue must establish that it is the Property of the Husband.

In Ramkinkar Banerji v. C. I. T., Bihar & Orissa, Ref. 4 I. T. R., page 108, principle of law somewhat is the same as held in Sova Ram Jokhi Ram v. C. I. T., Bihar & Orissa, Ref. 12 I. T. R., page 110, and L. Sheo Narain Lal, Inre 26 I. T. R., page 249.

Facts :— In this case collieries stood in the name of the lady and she received royalty of Rs. 15,353/- and odd. Husband was sought to be taxed on this income on the ground that the lady was the benamidar of the husband.

Held, no, it could not be included.

Principle (at page 110) :

There being, therefore, no dispute that the property stands in the name of the lady, she must be taken to be the owner of it unless there is any evidence to show that she is a benamidar. No. (b) and (c) are not strictly speaking findings of fact but are reasons given by the Assistant Commissioner for holding that the real owner was the assessee. They are based upon no evidence whatsoever. There is no presumption that a

property standing in the name of a married Hindu lady does in fact belong to her husband. The ordinary presumption of law is that the apparent state of affairs is real unless the contrary is proved.

Case No 35**Benamidar**

That in a Civil case *Kanakarathanammal v. V. S. Loganatha Mudaliar and another*, Ref. A. I. R. Vol. 52 (1965) [Civil Appeal No. 528 of 1961], page 271, following principle of Supreme Court have to be borne in mind where property is purchased by the wife with the money gifted by the husband, held that she is not the benamidar.

Subjects (at page 271) :

(a) *Benami - Purchase of property by wife*—Though consideration for sale transaction proceeded from husband his subsequent conduct showing his admission that title to property vested in wife—Purchase by wife cannot be held to be benami for husband but she is herself the owner of the property—Fact that the husband was in possession and management of the property or that he was receiving the rents does not affect the position—In ordinary Hindu families property belonging exclusively to a female member would also be normally managed by the manager of the family.

Principle (at page 275) :

The obvious question to ask in this connection is, has the property been gifted by the husband to his wife, and quite clearly a gift of immovable property worth more than Rs. 100 can be made only by registered deed. The enquiry as to whether the property was purchased with the money given by the husband to the wife would in that sense be foreign to Sec. 10 (2) (d) gift of money which would fall under Sec. 10 (2) (b) if converted into another kind of property would not help to take the property under the same clause, because the converted property assumes a different character and falls under Sec. 10 (2) (d). Take a case where the husband gifts a house to his wife, and later, the wife sells the house and purchases land with the proceeds realised from the said sale. It is, we think, difficult to accede to the argument that the land purchased with the sale—proceeds of the house should, like the house itself, be treated as a gift from the husband to the wife; but that is exactly what the appellant's argument will inevitably mean. The gift that is contemplated by Sec. 10 (2) (b) must be a gift of the very property in specie made by the husband or o her relations therein mentioned.

Case No. 36**Cash Deposit and High Denomination Notes**

Note :— This question has been examined by the Supreme Court in more than one case. In *A. Govindarajulu Mudaliar v. C.I.T., Hyderabad*, Ref. 34 I. T. R., page 807; it has been held that burden is upon the assessee to prove the book entry. Also in the case of *Kale Khan Mohammad Hanif v. C. I. T.*, Ref. 50 I. T. R., page 1, it has been held by the Supreme Court that income can be estimated by applying flat rate and also cash deposit be treated as income from undisclosed sources and there was nothing to preclude the Department from taxing the both. Burden was upon the assessee to show that both should not be included.

1. That in the case of *C. I. T., Madras v. S. Nelliappan*, Ref. 66 I. T. R., page 722, a different view has been expressed i. e. that Tribunal can delete the cash deposit if additional profits have been included by rejecting the account version.

2. That in the case of *Kanpur Steel Co. Ltd. v. C. I. T.*, (U. P.) Ref. 32 I. T. R., page 56; it has been held that whether the high denomination notes were encashed and covered by the cash balance in the business books, burden was upon the Department to show that notes were income.

(Case fully discussed *infra* in Chapter 4 — “Cash Deposit and Explanations”)

Case No. 37**General Principle**

In *Ganga Sahai Umrao Singh v. Commissioner of Excess Profits Tax*, U. P., C. P., and Berar, Ref. 18 I. T. R., page 988, general principle regarding Burden under taxing statute is stated by *Allahabad High Court* thus :—

Principle (at page 996) :

It may be profitable to refer to a decision of their Lordships of the Judicial Committee in the case of Otto George Gfeller v. the King, (1943-A. I. R., 1943 P. C. 211) wherein it was held that though upon the prosecution establishing that the accused was in possession of goods recently stolen the Court may presume that he was either the thief or had received the goods knowing them to be stolen, unless he can account for his possession

yet, where an accused person gives an explanation, which may reasonable be true and which is consistent with his innocence, even though the accused may have failed to convince the Court about the truth of the explanation given, the burden is again shifted and the prosecution has to prove that the accused is guilty. This case was considered by me in the case of Rex v. Ram Bharosey, (1949—A. L. J. 445) where I pointed out that the observations of their Lordships partly embodied the provisions of Section 114, Illustration A, of the Indian Evidence Act and what their Lordships intended to emphasise was that it was for the prosecution to prove that the accused was guilty and the accused had only to explain his possession. Though the observations were made in a criminal case still they are helpful to show to what extent the Court can go when a plausible explanation has been given but the party has failed to convince the Court of the truth thereof.

Case No. 37—A**General Principle**

1. *In Mahabir Prasad Munna Lal v. C. I. T., Ref. 15 I. T. R., page 393; the question arose where the assessee gives out story when called upon to explain a credit entry in the account books which no prudent man will believe it—rather it is a shilly story; then Income-tax Officer is perfectly right in drawing legitimate inference against the assessee and there is no onus upon him to show that it is income. Following observation from the statement of the case shows thus—*

(at page 396) :

We held in that order that the story of the applicant that one Hari Kishan deposited this amount of Rs. 14,000/- with the applicant was not only not proved but was false; and that the facts attending these deposits being peculiarly within the knowledge of the applicant, and he not having chosen to disclose them, we were entitled to infer that the deposits were in fact revenue from undisclosed sources and therefore taxable.

(at page 397) :

This presumption is an application of the general presumption which the law raises against misconduct of every kind including crime, fraud, forgery, dishonesty and fabrication. But when an Income-tax Officer issues a notice under Section 23 (2) of the Income-tax Act and puts in issue under Section 23 (3) of the Act the truth of an entry in the books, the

principle of Section 106 of the Evidence Act commences to operate and the transaction recorded in the books being a fact peculiarly within the knowledge of the assessee the onus of proving the correctness of the entry, the truth of which is called in question by the Income-tax Officer shifts to the assessee.

2. The above noted principle can be said to be true in the light of the judgment of the Supreme Court in *Homi Jehangir Gheesta v. C. I. T., Bombay City*, Ref. 41 I. T. R., page 135.

(Case discussed *infra* in Chapter 4-5.)

Case No. 38

Dividend

Declaration of higher Dividend is a Penal Provision—The Assessing Officer must make an Order which should be reasonable looking from Commercial point of view—The Order was held to be invalid.

In C. I. T., West Bengal v. Gangadhar Banerjee & Co. (Private) Ltd., Ref. 57 I. T. R., page 176.

Facts :—The Income Tax Officer had passed an order declaring higher dividend, without examining the case from the angle that in past years, there were losses. Smallness of profits was the factor why the company did not declare the dividend. The action of the Revenue authorities was not upheld by the High Court. Appeal of the Commissioner was also dismissed by the Supreme Court.

Held, that Revenue authorities failed to establish that commercial profits were different from those shown in the balance-sheet. Therefore, order was not justified.

Principles (at page 183-84) :—

1. *There is no provision in the Income-tax Act which makes the balance-sheet final for the purpose of section 23A of the Act or even for the assessment. It no doubt affords a prima facie proof of the financial position of the company on the date when the dividend was declared. But nothing prevents the parties in a suitable case to establish by cogent evidence that certain items were, either by mistake or by design, inflated or deflated or that there were some omissions. It does not also preclude the assessee from proving that the estimate in regard to certain items has turned out to be wrong and placing the actual figures before the Income-tax Officer.*

(at page 184) :

2. Section 23A of the Act is in the nature of a penal provision. In the circumstances mentioned therein the entire undistributed portion of the assessable income of the company is deemed to be distributed as dividends. Therefore, the revenue has strictly to comply with the conditions laid down thereunder. The burden, therefore, lies upon the revenue to prove that the conditions laid down thereunder were satisfied before the order was made: see *Thomas Fattorini (Lancashire) Ltd. v. Inland Revenue Commissioners* (11 I. T. R. Suppl. 50). In the present case the revenue failed to discharge the said burden: indeed, the facts established stamp the order of the Income-tax Officer as unreasonable.

Case No. 39

Exemption

To establish Charge of Tax—Onus is upon the Revenue—If Income is Exempt Assessee should prove it—Trust Income was not Exempt.

In H. E. H. Nizam's Religious Endowment Trust v. Commissioner of Income-tax, Andhra Pradesh, Ref. 59 I. T. R., page 582.

Facts :— By a deed dated September 14, 1950, the Nizam of Hyderabad settled certain securities for Rs. 40 Lakhs on trust. Under the deed the trust fund was to be accumulated during the lifetime of the settlor, and, after his death, the trustees should hold the said fund upon trust to spend the income therefrom for one or more of the four religious and charitable objects mentioned therein. Two of the said objects were for religious and charitable purposes within the taxable territories and the other two purposes outside the taxable territories. It is important to notice that under the deed no power was conferred on the trustees during the life-time of the settlor to set apart and allocate the accumulated income or a part of it from the trust properties for any one or more of the objects mentioned therein : that could be done only by the trustees after the death of the settlor. The said settlor is still alive.

Held, that exemption could not be granted as the assessee failed to bring its case within the provisions of the exemption clause.

Principle (at page 587) :

It is settled law that the burden is on the Revenue authorities to show that the income is liable to tax under the statute; but the onus of showing that a particular class of income is exempt from taxation lies on the

assessee. To earn the exemption, the assessee has to establish that his case clearly and squarely falls within the ambit of the said provisions of the Act.

Case No. 40**Exemption**

Where Receipt appears on the credit side of the Profit & Loss Account—Presumption is that it is Income if not Exempt from Tax which Assessee must prove it.

In Raghuvanshi Mills Ltd., Bombay v. C. I. T., Bombay—City, Ref. 22 I. T. R., page 484.

Facts — The assessee a business concern got itself insured for loss of profits. The Insurance Company in one year had to pay Rs. 14,00,000/- under the said Policy. The assessee's contention was that it was not income which should be brought to tax. That under the conditions of the Policy it was only payable to the assessee, if the assessee company would re-invest and start business with this amount. Therefore, according to the assessee, it was casual receipt and should not be assessed to tax.

Held, definition of income was wide and would cover all such receipts which had not been shown to be exempt on the ground that it was a non-recurring receipt. Further it is held that it was a receipt arising out of business and so was taxable.

Principle (at page 488-89) :

The assessee is a business company. Its aim is to make profits and to insure against loss. In the ordinary way it does this by buying raw-material, manufacturing goods out of them and selling them so that on balance there is a profit or gain to itself. But it also has other ways of acquiring gain, as do all prudent businesses, namely by insuring against loss of profits. It is indubitable that the money paid in such circumstances is a receipt and in so far as it represents loss of profits, as opposed to loss of capital and so forth, it is an item of income in any normal sense of the term. It is equally clear that the receipt is inseparably connected with the ownership and conduct of the business and arises from it. Accordingly, it is not exempt.

This question was considered by the Supreme Court of Canada which decided that a receipt of this nature is not a "profit" and so is not taxable

(B. C. Fir and Cedar Lumber Co. v. The King—1931—Canada L. R. 435). But the Court did not examine the wider position whether it is “income” and in any event the decision was reversed on an appeal to the Privy Council (1932 A C 441, at page 448). Their Lordships held it is “income”. This was followed later by the Court of Appeal in England and endorsed by the House of Lords in Commissioners of Inland Revenue v. William’s Executors (26 Tax Cases 23). In so far as these decisions do not turn on the special wording of the Acts with which they are respectively concerned and deal with the more general meaning of the word “income”, we prefer the view taken in England.

It is true the Judicial Committee attempted a narrower definition in Commissioner of Income-tax v Shaw Wallace & Co., [(1932) 59 I. A. 206] by limiting income to “a periodical monetary return ‘coming in’ with some sort of regularity, or expected regularity, from definite sources” but, in our opinion, those remarks must be read with reference to the particular facts of that case. The non-recurring aspect of this kind of receipt was considered by the Privy Council in the King v. B.C. Fir and Cedar Lumber Co. and we do not think their Lordships had in mind a case of this nature when they decided Shaw Wallace & Company’s case.

Note :— Normal presumption is that every receipt on credit side of the Profit & Loss Account is income unless proved to be exempt.

Case No. 41

Gift

“A Receipt whether Income” must be Established by the Revenue Authorities—If it is Gift, it is not Income.

In Parimisetti Seetharamamma v. C. I. T., Andhra Pradesh, Ref. 57 I. T. R., page 532.

Facts :—The assessee explained that the jewellery and amounts of money received by her in the relevant years were gifts made by ‘S’, who was the Maharani of Baroda State. Relying on the following pieces of evidence, viz., (i) her admission that she acted as the local agent of ‘S’ for disbursing salaries to the servants of ‘S’ and (ii) that in a bill issued by a garage, the assessee was described as the private secretary of ‘S’, and observing that she had failed to place before the Income-tax authorities all the evidence in support of her contention,

the Appellate Tribunal held that what was given to the assessee by 'S' was remuneration for services rendered or to be rendered.

Held, that assessee had been wrongly assessed, as the amounts received by her, were gifts, and there was no burden upon the assessee to prove that it was not income.

Principle (at page 539) :

The conclusion of the Tribunal is therefore based on matters which may at the highest create some suspicion, and upon its view that the burden of proving that the receipts were not taxable lay upon the appellant. But a conclusion recorded by the Tribunal by wrongly throwing the burden of proof upon the assessee cannot be regarded as binding upon the High Court in a reference under section 66 of the Income-tax Act.

Case No. 42

H. U. F.

Property Title—Properties purchased by the Karta in the name of his sons from out of the Family Funds—They should be attached for Tax on H. U. F.

In Kalwa Devadattam and others v. Union of India and others, Ref. 49 I. T. R., page 165.

Facts :—'N' had purchased certain properties in the name of his sons out of the family funds. Some partition deed was executed effecting the partition of the properties. Revenue authorities treated the properties as belonging to H.U.F., and the partition deed a sham affair. The properties were attached towards taxes due on the family assessments. A Civil suit was filed by 'N' challenging the attachment made by the Revenue authorities.

Held, t' at Civil suit was not maintainable.

Principles (at page 174) :

1. *The properties having been purchased in the names of the two plaintiffs the burden prima facie lay upon the taxing authorities to establish that the sale deed was taken for and on behalf of the joint family or with the aid of joint family funds.*

(at page 176) :

2. *But if the monies were actually paid by Nagappa and the story about Seshamma having provided the amount be disbelieved, it would be a*

legitimate inference consistent with probability that Nagappa had for purchasing the property provided the funds out of the joint family earnings. (at page 177) :

3.that the deed of partition was a sham transaction and, therefore, they were entitled to proceed in execution.

Case No. 43**Income Remittance**

Presumption is that it is Income, unless Onus discharged by the Assessee that it is not so.

In Bipin Lal Kuthiala v. G. I. T., Punjab, Ref. 30 I. T. R., page 1.

Facts :—The assessee, a forest contractor resident and ordinarily resident in British India, sold, in the Native State of Jubbal, a quantity of timber to a firm carrying on business in India for Rs.1,91,000/- in the accounting year 1942-43. A sum of Rs.1,57,000/- was realised by the assessee from the purchaser in the accounting year 1943-44 as follows : (a) Rs. 1,25,000/- received in cash in the Jubbal State; (b) Rs. 29,000 received in cash in British India; and (c) Rs. 3,000/- paid in British India to a creditor of the assessee. The Revenue authorities treated this payment as resulting in remittance of profits on the business of sales of timber in Jubbal State in the preceding year. Appellate Tribunal found that there was a profit earned by the assessee in 1942-43 on sale transactions made in Jubbal State, and constructive remittance in the year 1943-44 was properly taxable as remittance of income. Tribunal and High Court refused to allow the reference as in their opinion there was no question of law. Supreme Court confirmed the Tribunal's judgment.

Principle (at page 2) :

There being the profit as eventually ascertained, the presumption was that the remittances to British India must be of profits unless the contrary were shown by the assessee; it was open to him to have adduced evidence to show that he was remitting his capital, but he failed to do so; therefore, the assessee not having discharged the onus that was on him the Appellate Tribunal was justified in coming to the conclusion that the remittances included the profits.

Case No. 44

Penalty

Though there is no direct judgment on the subject by the Supreme Court of India, its importance is none the less there because all the High Courts in India have given judgments on this issue. Majority of opinions of different High Courts in India is that the penalty provisions are quasi-criminal in nature and should be strictly construed. They are of the opinion that in imposing the penalty, the burden lies on the Revenue authorities. Merely because the assessment has been made in which cash deposit is included as income from undisclosed sources; this itself will not be sufficient for imposing penalty on the ground that profits were concealed. The view of the *Allahabad High Court* in strict sense is not opposed to the view expressed by other High Courts.

(A) The first case on this subject was decided by the *Bombay High Court* '*C. I. T., Ahmedabad v. Gokuldas Harivallabhdas*, Ref. 34 I. T. R., page 98,' in which the following principles are stated :—

Principles (at page 105) :

1. *The proceedings under Section 28 (1) (c) in their very nature are penal proceedings, and the elementary principles of criminal jurisprudence must apply to these proceedings and nothing is more elementary at least in this country in criminal jurisprudence than the principle that the burden of proving that the accused is guilty is always upon the prosecution.*

2. *Therefore, the Department must establish that the receipt of Rs. 15,203/- constitutes "income" of the assessee. There is not an iota of evidence on the record except the explanation given by the assessee, which explanation has been found to be false.*

3. *Now, it does not follow that because the particular explanation given by the assessee is false, therefore, necessarily the receipt of Rs. 15,203/- constitutes a taxable income of the assessee.*

4. *Now, if you wipe off from the slate this evidence, nothing whatever remains, and as we have just said, the very basis of the decision against the assessee is that the explanation he gave was a false one.*

(at page 106) :

5. *It is hardly necessary to emphasise that the assessee is not called upon to prove his innocence; it is for the Department to establish his guilt. If there was any evidence on which the Income-tax Officer had relied,*

then undoubtedly it was for him to be satisfied under the provisions of section 28 (1) (c), but when there is no evidence the majority of the Tribunal was perfectly right in coming to the conclusion that the charge against the assessee was not brought home to the assessee.

6. It has often been said that each proceeding under the Income-tax Act is a self-contained proceeding and the findings in one proceeding do not become binding in respect of other proceedings. Now, it is difficult to understand why this well-known principle should be departed from in penalty proceedings.

(B) The other case on the subject is of *Madhya Pradesh High Court 'C. I. T. (M. P.) v. Punjabhai Shah*, Ref. 67 I. T. R., page 337'. The following principles of law are stated by the *Madhya Pradesh High Court* :

Principles (at page 341) :

1. the question whether the assessee concealed the particulars of his income or whether he has committed an offence under section 28 (1) (c) of the Income-tax Act, 1922, is a question of fact to be determined in the circumstances of the case.

(at the same page) :

2. The penalty proceedings, being in their very nature penal proceedings, the degree or quantum of proof for finding an assessee guilty is that of a criminal prosecution. The assessment proceedings and penalty proceedings are different in their nature. The findings given in assessment proceedings are no doubt relevant and admissible in penalty proceedings. But they do not operate as *res judicata* so as to preclude the production of other evidence in penalty proceedings to show that the assessee concealed his income or to rebut this charge. Again, the bare fact that the explanation offered by the assessee in the assessment proceedings was rejected and it was held in those proceedings that he had concealed his income or that the explanation was unsatisfactory by itself cannot be made the basis of the conclusion that he has been guilty of deliberately concealing the particulars of his income. No doubt, if the assessee's explanation is found to be deliberately false, then it is possible to infer that he concealed his income. But the authority competent to impose a penalty must expressly find that the assessee's explanation is false.

There are other High Courts who agree with the principles stated by *Bombay High Court* and by *Madhya Pradesh High Court*.

(C) In the judgment of the *Allahabad High Court*, however, there are some distinguishing features. It has expressed its views in '*Mohd. Atiq v. Income-tax Officer, District II (V) Kanpur*, Ref. 46 I. T. R., page 452,' where they have observed :—

(at page 456-57) :

.....that proceedings for imposition of penalty are in the nature of criminal or quasi-criminal proceedings. In penalty proceedings, the burden is always upon the department to prove that the particular assessee has brought himself within the ambit of the penal provision. The mere fact that an explanation offered by the assessee may have been disbelieved does not, by itself, warrant the imposition of penalty. Even if, in spite of the rejection of the explanation offered by the assessee, the material is not enough to clinch the issue against the assessee, no penalty can be imposed.

(D) The next case of the *Allahabad High Court* is '*Lal Chand Gopal Das v. C. I. T., U. P. & V. P.*, Ref. 48 I. T. R., page 324, in which Amanat Khata was required to be explained by the assessee but he failed to disclose the names of the people from whom the deposits were taken in the Amanat Khata. Revenue authorities came to the conclusion that the assessee was deliberately concealing the real nature of receipt. They imposed penalty. High Court's view is that no penalty can be imposed unless the explanation of the assessee is found to be false.

Principle (at page 338) :

It is only when they base their earlier finding not on the falsity of the claim made by the assessee about the nature of the receipt but on their mere holding it not proved, or on their being in doubt whether it was correct or not, that the materials they had before them in the assessment proceedings can be said to be not sufficient to justify the finding adverse to the assessee in the penalty proceedings.

Note :— If minutely examined there is no conflict in the views expressed by different High Courts so far it is held, that no penalty can be imposed merely because the amount added in the assessment has been sustained in appeal. But in 48 I. T. R., page 324, penalty imposition was confirmed on the ground of false explanation.

Case No. 45

Period

Compounding of an Assessment of an Earlier Year—Whether includes sales made in the Subsequent Year—Onus upon the Assessee.

In S. S. Rajalinga Raja v. State of Madras, Ref. 63 I. T. R., page 617.

Facts :—For the assessment years 1955-56 and 1956-57, assessee did not submit return but got his income assessed and case compounded by the Revenue authorities of the Sales-tax Department. In the year 1957-58 he submitted the return with an income of Rs. 5,250/- and odd. The Sales-tax Officer found that he effected the sales of Rs. 58,375/- of the crop which should be brought to tax in the year 1957-58 i. e. when the sales took place. Assessee's contention was that it was the crop of the preceding three years and remained unsold, so it should relate to the preceding years. This was considered to be no ground for excluding the sales from the assessment of 1957-58. Appellate Tribunal directed that on average basis, assessment should be made. High Court reversed the judgment of the Appellate Tribunal and restored the assessment order.

Held, by the Supreme Court that the sales made in the accounting year relevant for the assessment year 1957-58 could not be excluded from the assessment. Onus was upon the assessee to prove that compounding of two earlier assessments included the sales of the year 1957-58 also. If onus is not discharged sales could not be exempted from tax.

Principle (at page 619-20) :

The expression "income" in its normal connotation does not mean mere production or receipt of a commodity which may be converted into money. Income arises when the commodity is disposed of by sale, consumption or use in the manufacture or other processes carried on by the assessee qua that commodity. There is no reason to think that the expression "income" in the Act has any other connotation. A tax on income whether agricultural or non-agricultural is, unless the Act provides otherwise, a tax on monetary return—actual or notional. Section 4 of the Act supports that view, for in the total agricultural income is comprised all agricultural income derived from a plantation in the State. It is not necessary, however, for income to accrue that there must be a sale of a

commodity : consumption or use of a commodity in the business of the assessee from which the assessee obtains benefits of the commodity may be deemed to give rise to income. Therefore, merely because the produce of his plantation was received in the earlier years, assuming that the appellant's case is true, income derived from sale of that produce in the year of account is not exempt from tax under the Act, in that year.

Case No. 46**Person**

Partners Cash Deposit in Firm's Books—Burden upon the Department that it is Firm's Income.

In Narayandas Kedarnath v. C. I. T., Central, Ref. 22 I. T. R., page 18.

Facts :— There were certain credits in the firm's books in the name of the partners who explained that they brought the money through Bank draft from their native place to cover losses of the partnership firm. The explanation was found to be unsatisfactory. The Income-tax Officer included the amount in the firm's assessment. Tribunal confirmed the assessment.

In the Bombay High Court, Held, that Tribunal was wrong in treating that cash deposit as income of the firm. Burden was on the Department to establish from materials on record that the amount was really the firm's income and not those of the partners. In the absence of any such material, only course open to the Revenue authorities was to include the amount in the assessment of the partners and not in that of the firm.

Case No. 47**Reassessment**

Materials if sufficient—Onus on the Department in reopening the case.

In Bhimraj Pannalal v. C. I. T., Bihar & Orissa, Ref. 41 I. T. R., page 221.

Facts :— Assessee had given an explanation that some of the transactions were financed by him from the Zamindari income. The result of these transactions was not brought into business books nor assessed in the original assessment. Explanation of the assessee was found to be false. On these facts, the case was reopened. *Judgment of the Patna High Court, Ref. 32 I. T. R., page 289.*

Held, that reopening was valid.

Principles (at page 299) :

1. the burden of proving that the income had "escaped-assessment" within the meaning of section 34 of the Act was on the Income-tax authorities.

(at page 301) :

2. That section, although it is a part of a taxing Act, is not a charging section, but a machinery section; and a machinery section should be so construed as to effectuate a charging section, and, in interpreting the provisions of this kind, the rule is that that construction should be preferred which makes the machinery workable.

By the Supreme Court, Ref. 41 I. T. R., page 221, affirming the above Judgment **Held**, that materials before the Revenue authorities were sufficient to establish that income had escaped assessment, that reopening was valid and justified.

Note :— While in the case of 'Sree Lekha Banerjee and others v. C. I. T., Ref. 49 I. T. R., page 112,' it has been held by the Supreme Court that burden of establishing the genuineness of cash credit is on the assessee in the original assessment as well as in the reassessment proceedings.

Case No. 48

Reassessment

Production of Account Books alone is not sufficient in the Eyes of Law.

In *Kantamani Venkata Narayana & Sons v. First Additional Income-tax Officer, Rajahmundry*, Ref. 63 I. T. R., page 638.

Principle (at page 644) :

It is clearly implicit in the terms of sections 23 and 34 of the Income-tax Act (Old Act) that the assessee is under a duty to disclose fully and truly material facts necessary for the assessment of the year, and that the duty is not discharged merely by the production of the books of account or other evidence. It is the duty of the assessee to bring to the notice of Income-tax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced, the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that

account be precluded from exercising the power to assess income which had escaped assessment.

Note :— In this case *prima-facie* the Income-tax Officer had reason to believe that income had escaped assessment because he had found the investment very much disproportionate to assessee's income in the years between 1938—1950. Considering the affidavits of both the parties High Court rightly came to the conclusion that there did exist conditions for issuing notice for reassessment. That it would not be High Courts duty to examine the issue in the writ petition by judging what would be the final outcome of the proceedings. If *prima-facie* there did exist a jurisdiction to issue a notice it was enough in the eyes of law.

Case No. 49

Residence

Persons' Residence is based on Evidence.

In Erin Estate, Galah, Ceylon v. C. I. T. Madras, Ref. 34 I.T.R., page 1.

Principles (at page 5) :

1. *Where the partners of a firm are residents of this country, the normal presumption would be that the firm is resident in the taxable territories. This presumption is rebuttable and it can be effectively rebutted by the assessee showing that the control and management of the affairs of the firm is situated wholly without the taxable territories. The onus to rebut the initial presumption is on the assessee.*

2. *It must be shown by evidence that control and management in the affairs of the firm is exercised, may be to a small extent, in India before it can be held that the control and management is not situated wholly without the taxable territories.*

Note :— Case discussed fully *infra* Chapter V.

Case No. 49-A

It might be useful to reproduce under lying principles from the judgment of Fazl Ali, J. in the case of '*V. Vr. N. M. Subbayya Chettiar v. C. I. T., Madras, Ref. 19 I. T. R., page 168*'.

Principles (at page 171) :

1. *...that the conception of residence in the case of a fictitious*

'person', such as a Company, is as artificial as the company itself, and the locality of the residence can only be determined by analogy, by asking where is the head and seat and directing power of the affairs of the company.

(In *Swedish Central Railway Co., Ltd. v. Thompson*, Ref. 9 T.C. 342, as 373).

(at page 172) :

2. Mere activity by the company in a place does not create residence, with the result that a company may be 'residing' in one place and doing a great deal of business in another.

3. The central management and control of a company may be divided, and it may keep house and do business in more than one place, and, if so, it may have more than one residence.

4. In case of dual residence it is necessary to show that the company performs some of the vital organic functions incidental to its existence as such in both the places, so that in fact there are two centres of management.

Case No. 50

Residence

Appellate Tribunal's finding that Assessee was resident in British India justified

In *C. I. T. , West Bengal v. B. K. Dhote*, Ref. 66 I. T. R., page 457.

Facts :— Assessee for 7 years was resident in Nagpur and in 1943, he shifted to Hyderabad and carried on his business. He visited British India in the accounting year relevant to assessment years 1945-46 and 1946-47. He submitted his return suomuto and got himself assessed as non-resident by the Income-tax Officer, Bombay. Subsequently at Calcutta again an enquiry was made regarding the business activities of the assessee in British India. The assessment at Calcutta was also made but discharged by the A. A. C. . Then the matter came before the Appellate Tribunal. They called the assessee in person and recorded his statement. That from the demeanour of the assessee Tribunal found that his version was hazy and not reliable. The Tribunal also found that there was remittance of the money from Hyderabad to Bombay Rs. 10,000/- and Rs. 12,000/- on two occasions. The assessee suggested before the

Appellate Tribunal to make enquiry from Shri Patwardhan, the cashier, who had carried the money upto Bombay from Hyderabad but there was no specific request made by the assessee to summon the cashier and record his statement. On the evidence before them, the Appellate Tribunal, reversed the judgment of the A. A. C. and restored the order of the Income-tax Officer Calcutta. In reference High Court answered the question in favour of the assessee. When the case came before the Supreme Court the Commissioner was successful. High Court's judgment was reversed on the ground that Tribunal did not err in taking the view on the materials before them.

Held, that the assessee was resident and ordinary resident in British India in the two disputed years. That the Tribunal did not act on surmises or conjectures but on proper material.

Principle of law (at page 461) :

It is open to the assessee still to prove that his visit or visits in the previous years were occasional or casual. In determining whether the visits are occasional or casual, the Tribunal has to consider the presence of the assessee in the taxable territory in relation to the object of the visit which must, in each case, be gathered from the circumstances in which the assessee paid the visit, and his conduct. Accidental presence in or a visit for a social purpose to the taxable territory may be regarded as occasional or casual, but a visit in connection with the business carried on by the assessee may not normally be regarded as occasional or casual.

Note :— Therefore, from this case it is suggested that if evidence is to be lead witness should be specifically summoned to give a statement. That mere suggestion to make an enquiry from him is not enough. There is no onus on the Department to make such enquiry or summon any one witness by themselves if the assessee is careless.

Case No. 51

Sale Deed

Value whether genuine or fictitious-Burden upon the Assessee.

In Associated Clothiers Ltd. v. C. I. T., Calcutta, Ref. 63 I. T. R., page 224.

Facts:—There was a Company named 'F' & Company which

carried on business of tailors. Its name was altered to that of Associated Clothiers Ltd. by an order of the court. On March 21, 1952, an agreement was made between Associated Clothiers Ltd., and a newly formed 'F' & Company for the sale and transfer of assets belonging to Associated Clothiers Ltd.. The possession of the articles mentioned in the agreement was given to newly formed 'F' & Company. There was no deed of conveyance. The value was mentioned against each article which was in the statement annexed to the agreement of transfer. The value of the building was more than the cost price. Question was whether the difference between written down value and the cost price could be treated as income within the provision of taxing attitude. Assessee's contention was that these values were merely notional and not genuine. It was in consideration of allotment of shares that these values had been fixed and the assets transferred to 'F' & Company.

Held, that in absence of any evidence to the contrary the values mentioned against each article in the statement could not be treated as mere notional or fictitious. The profit thus was taxable in the hands of assessee's company.

Principle (at page 231) :

The burden of proving that the consideration for sale of the property was less than what it purports to be under the agreement of sale lay upon the company and since no attempt was made to prove that fact, the question cannot be raised for the first time in this court.

Case No. 52

Speculation Loss

Onus upon the Assessee to discharge Burden, and prove from the Materials the result of his Account Books.

In R. B. Seth Champalal Ramswarup v. C. I. T., East Punjab, Delhi and Ajmer, Ref. 60 I. T. R., page 493.

Facts:— Assessee claimed that about Rs. 1,58,080/- was the loss suffered by him under the head speculation. He produced account books. Suitable entries were made in the Rokar Nakal Khata and also contracts with the Brokers were produced. He also proved that Rs. 85,137/- was the money introduced by him out of sale proceeds of home ornaments. The Income Tax Officer disallowed

the loss as not proved. He added cash deposits as income from undisclosed sources rejecting the sale explanation as unreliable. A.A.C. confirmed the assessment. Tribunal deleted the cash deposits and refused to allow the loss. It did not refer the case to the High Court.

Principle (at page 495) :

The burden of proving that the appellant had suffered losses in speculation lay upon it, and the Tribunal on a review of the evidence held that the appellant failed to prove that case. No question of law arises from the finding recorded by the Tribunal.

Case No. 53

Speculation Loss

Vaida Transactions merged with Speculative Transaction—Onus on the Assessee to establish his case—Revenue Authorities were justified in treating the Loss as a Speculation Loss.

In C. I. T., Kerala v. Joseph John, Ref. 67 I. T. R., page 74.

Facts :— The respondent (hereinafter called the “assessee”) is an oil miller who purchases cocoanuts and copra for extraction of oil in his own expellers or chekkus for the market. The purchases of the raw materials, cocoanuts and copra, are made ready for spot delivery as also for delivery in Vaida dates.

The sales of oils were also made on the same basis by the assessee. All these contracts, ready and forward, were on a large scale and were put through either the ‘Alleppey Oil Millers’ Association, commission agents or through other merchants. The aforesaid contracts were of two varieties; those on which delivery was intended, and those intended to be settled on the Vaida dates, only for price differences. The latter type, forward contracts, for purchase or sale, were all entered in a single account called “Oil Vaida Price Difference Account”.

In Vaida transactions the assessee suffered loss in calendar year 1952—53 and question arose whether this loss is permissible deduction as hedging loss, or is it speculative loss falling under section 24 (1) proviso of the old Act.

Held, Speculative loss cannot be given a set off against other income of the firm in the same year, but it can be only carried for-

ward to the subsequent year. Assessee's contention that transaction should be treated as hedging transaction was not accepted because onus was on the assessee which he did not discharge.

Principle (at page 78) :

It is manifest that the burden of proof was upon the assessee to show that the transactions are merely hedging transactions within the meaning of proviso (a) and in the absence of any evidence produced on the part of the assessee, Explanation 2 applied to the case and the transactions must be held to be speculative transactions as defined therein.

Note :— The High Court could not interfere with the finding of facts arrived at by the Tribunal, because Tribunal did not misdirect itself in determining the real nature of the transaction on the basis of the entries in the account books. In that account all the transactions were merged in one account, and accordingly, it was held that transactions could not be hedging transactions.

Case No. 54

Trade

Adventure in the nature of trade—Whether it is trade, Onus on the Department.

In Saroj Kumar Mazumdar v. C. I. T., West Bengal, Ref. 37 I. T. R., page 242.

Facts :— Assessee purchased a building site from a Society at Calcutta. The intention of the assessee was probably to build workshop for himself and also a residence. There was no evidence that he had one residence of his own when he purchased this land from the Society. He had a flourishing business with better prospects in future at the time when he purchased the site. Under changed circumstances he sold the land on profits. The sale price over and above the cost of land was treated as income from adventure in the nature of trade. Supreme Court had drawn a fine distinction between class of the cases of isolated transactions :

- (i) Sometimes results in profits which are taxable, and
- (ii) Sometimes results in capital appreciation.

The Department should discharge the onus and bring the case under clause (i) before they can tax it.

Held, that the assessee was not chargeable as he did not embark upon the transaction of purchase and sale with a view to make profit.

Principles (at page 248) :

1. *It has also not been disputed that in a case where a transaction under examination is not in the line of the business of the assessee, and is an isolated or a single instance of a transaction like that, the burden lies on the Revenue to bring the case within the words of the statute, namely, that it was an adventure in the nature of trade.*

(at page 254) :

2. *In all the circumstances of this case, the total impression created on our mind is that it has not been made out by the Department that the dominant intention of the appellant was to embark on adventure in the nature of trade, when he entered into the agreement which resulted in the profits sought to be taxed.*

Case No. 54—A**Trade**

In Janki Ram Bahadur Ram v. C. I. T., Calcutta, Ref. 57 I. T. R., page 21.

Facts :— One company had a jute pressing factory and it also had some land on lease with a warehouse on it. There were two warehouses on the land held as a licensee. The whole of this company was sold to Janki Ram Bahadur Ram, the assessee at the time when suit was pending against the company in Civil Court for ejectment. The sale was affected in October, 1942. The assessee got his name substituted in the aforesaid Civil Suit. Without working for a single day the assessee sold this factory to a third party in June, 1943. The sale deed was executed in September, 1943. Huge profits were made by the assessee on this deal. The assessee was otherwise carrying on business in hardware only. The assessee's contention was that it was not an adventure in the nature of trade and profit was not earned as income. It was just a capital appreciation.

Held, that there was no material to justify that it was an adventure in the nature of trade. Revenue authorities must discharge the burden which they have failed to do.

Principles (at page 24) :

1. *It is for the revenue to establish that the profit earned in a transaction is within the taxing provision and is on that account liable to*

be taxed as income. The nature of the transaction must be determined on a consideration of all the facts and circumstances which are brought on the record of the Income-tax authorities.

(at page 25) :

2. If, for instance, a transaction is related to the business which is normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred. A similar inference would arise where a commodity is purchased and sub-divided, altered, treated or repaired and sold, or is converted into a different commodity and then sold. Magnitude of the transaction of purchase, the nature of the commodity, subsequent dealings and the manner of disposal may be such that the transaction may be stamped with the character of a trading venture.

(at page 26) :

3. The above are cases of commercial commodities. But a transaction of purchase of land cannot be assumed without more to be a venture in the nature of trade.

4. that a profit motive in entering into a transaction is not decisive, for, an accretion to capital does not become taxable income, merely because an asset was acquired in the expectation that it may be sold at profit.

(at page 27-28) :

5. Granting that the appellant made a profitable bargain when he purchased the property, and granting further that the appellant had when he purchased it a desire to sell the property, if a favourable offer was forthcoming, these could not without other circumstances justify an inference that the appellant intended by purchasing the property to start a venture in the nature of trade.

Case No. 55

Valuation

Fair Market Value to be proved by the Assessee.

In Killick Nixon & Co. v. C. I. T., Bombay City-1, Ref. 66 I. T. R., page 714.

Question arose as to what was the value of the assets on 1st. January, 1939. Certain figures were supplied by the assessee and also he had to produce some evidence in support of the same. The figures adopted by the A.A.C. and by the Tribunal were different

from what the assessee contended. High Court did not accept the Tribunal's finding as correct, because inferences were not based upon the evidence which was placed before them. Supreme Court accepted the answer given by the High Court.

Principle (at page 719-20) :

The Appellate Assistant Commissioner estimated the value of the three assets on January 1, 1939, at Rs. 51,40,802. The assessee contended that the evidence on the record showed that the market value exceeded the estimated value. It is true that the onus lay upon the assessee to prove the fair market value of the assets on January 1, 1939, to the satisfaction of the Income-tax Officer and, therefore, of the Tribunal. The Tribunal did not consider the evidence and disposed of the claim of the assessee after observing that the value of the assets could not exceed the amount at which it was estimated by the Appellate Assistant Commissioner.

Under the scheme of the Income-tax Act, the Tribunal is the final authority on questions of fact. The Tribunal in deciding an appeal is bound to consider all the evidence, and the arguments raised by the parties. The Tribunal apparently did not consider the evidence : it merely recorded a bare conclusion without setting out any reasons in support thereof. It is therefore not possible to say whether the Tribunal considered the evidence and the contentions raised by the assessee; it cannot be assumed merely because a conclusion is recorded that the Tribunal considered the evidence. The High Court, was, therefore, right in recording an answer in the affirmative on the fourth question. It will be the duty of the Tribunal in disposing of the appeal under section 66 (5) of the Income-tax Act to hear the parties and to determine on a consideration of the evidence the value of the three assets on January 1, 1939, in the light of the third proviso to section 12 B (2).

Avoidance of Tax & Device

There is now a consencious of opinion that avoidance of tax by legal means is not invalid unless it could be shown by evidence that transactions are either benami or there was a device for evasion of tax. Device pre-supposes diversion of profits by fraud. But if the transaction is held to be genuine it cannot be counter acted by the Revenue authorities on the ground that it affects reduction of tax incidence. In this background certain legal principles of the following cases stated by the Supreme Court are discussed hereunder :

Case No. 56

In C. I. T., Gujarat v. A. Raman & Co , Ref. 67 I. T. R., page 11.

Facts:- The assessees, M/s. A. Raman & Company, are dealers in "Mill Stores". In the course of their business they sell "Mill Stores" to other dealers including two concerns trading in the name of M/s. A. M. Shah & Co. and M/s. R. Ambalal & Co., which are owned by the Hindu undivided families, managers of which are the only partners of the assessee's firm. Assessments were made upon the assessee's firm and the two partners of the firm which were assessed separately by two different Income-tax Officers on their respective incomes. Subsequently jurisdiction of all these assesements was brought before one Income-tax Officer. Later Income-tax Officer by letter dated March 20, 1964, informed the assessees that he was convinced from a perusal of the assessment records of the assessee's firm and its two partners records which were assessed as

Hindu undivided families that the partners of the assesseees had contrived to divert profits of the assesseees to their respective Hindu undivided families and had tried to "evade proper taxation". On that ground, he called upon the assesseees to submit their objections, if any, to the reopening of the assessments for the years 1959-60, 1960-61, and 1961-62. The case was however, reopened and the High Court in a writ Petition held that one of the two conditions for reopening the case was only satisfied so reopening was without jurisdiction. The appeal by the C. I. T. to the Supreme Court was dismissed, though not on the ground on which High Court had quashed the notice for reassessment but because there was no ground for holding that there was evasion of tax.

Principle (at page 17-18) :

The law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands : income which he could have, but has not earned, is not made taxable as income accrued to him. By adopting a device, if it is made to appear that income which belonged to the assessee had been earned by some other person, that income may be brought to tax in the hands of the assessee, and if the income has escaped tax in a previous assessment a case for commencing a proceeding for reassessment under section 147 (b) may be made out. Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income-tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented.

If the goods were nominally transferred to the Hindu undivided families, the latter acting merely as benamidars for the assesseees, and the profits were earned in truth by the assesseees, income earned by sale of the goods by the Hindu undivided families may be held chargeable to tax as income which has escaped assessment to tax in the hands of the assesseees. In the present case, no such case was attempted to be made out in the affidavit filed by the Income-tax Officer.

Case No. 57

The second case of the Supreme Court is *C.I.T., Bombay City v.*

Provident Investment Co., Ltd., Ref. 32 I. T. R., page 190. Supreme Court has affirmed the judgment of the Bombay High Court; *Ref. 24 I. T. R., page 33,*

Facts :— The assessee company was the Managing Agent of two other companies viz. 'M' & Co. and 'S' & Company. Gwalior Darbar held bulk of the conversion shares of both the companies 'M' and 'S'. The Directors of the assessee company were approached by Dalmia company for transferring the bulk shares and managing agency to them. In September, 1946, Directors in a meeting agreed to the offers made by Dalmia Company. They conveyed the acceptance. In October, 1946, Dalmia Company, modified its earlier offer in the following respect :—

"In our letters of offer which have been accepted by you, it was arranged that the managing agency will be transferred either to us or to our nominees. Now, instead of doing so by you, you as the present managing agents will give their (sic.) resignation, so that at the time of delivery of the shares and payment of moneys, your managing agency will have come to an end. In view of the above, it is not necessary to obtain any sanction of general meeting."

The intention of this modification in the offer was to avoid payment of capital gains tax under Section 12 B of the Income-tax Act of 1922. The total compensation on this transaction receivable by the assessee company was Rs. 1 crore. The assessee company agreed to the modified proposals.

In the Bombay High Court, Held, that no capital gains tax was chargeable. In the present case because managing agency which was a capital asset was surrendered and it was not transferred (because relinquishment was not chargeable to tax in the provisions which came into force on 1st. April, 1946). Also held, that assessee arrange his affairs so as to pay less tax and the Revenue authorities can not challenge it.

Principle (24 I. T. R., at page 39) :

Now, as we shall presently point out, the authorities make it clear that it is not competent to the Court to look to the substance of the matter independently of the real transaction arrived at between the parties. If a transaction creates certain legal rights and obligations, then the Court must give effect to those legal rights and obligations and must not,

overlooking these rights and obligations, try and fathom what was in substance the nature of the transaction entered into by the parties. The Court is not confined merely to looking to the form of the transaction. It is open to the Court to ignore the form and ascertain the real nature of the transaction. But while it is open to the Court to ignore the form, it is not open to the Court to overlook or to ignore the true legal position that arises out of a document or documents in which the parties have chosen to embody the transaction or transactions. The Court may even look at the surrounding circumstances in construing a document, but the Court in looking at the surrounding circumstances must be anxious all the time to determine what is the true nature of the transaction. It has also been stated that the same result may be achieved by two entirely different transactions and it may be that whereas one transaction could be subjected to tax the other might not be and it is not open to the Court to tell the assessee that he should rather have entered into a transaction which subjected him to taxation rather than a transaction which permitted him to escape taxation. A citizen is perfectly entitled to exercise his ingenuity so to arrange his affairs as may make it possible for him legally and lawfully not to pay tax, and if his ingenuity succeeds, however reluctant the Court may be to acknowledge the cleverness of the assessee, the Court must give effect to the letter of the taxation law rather than strain that letter against the assessee.

Now, these principles have been enunciated and have now been accepted as well settled canons of interpretation and of determination of the nature of a transaction when the question arises whether a particular transaction is subject to tax or not.

Case No. 58

Third Supreme Court case is *Eastern Investments Ltd. v. C. I. T., West Bengal*, Ref. 20 I. T. R., page 1.

Facts :— The assessee, an investment company, was originally formed for acquiring, holding and otherwise dealing with shares and government securities which belonged to "C". The share capital of the company was 250 lacs and the majority of its shares, including 50,000 ordinary shares of the face value of Rs. 50,00,000, was held by "C" and the rest was held by the nominees of "C". "C" died and "S" was appointed administrator of his estate. "S" held the 50,000 ordinary shares in that capacity. Money was needed by the

executors of "C" and accordingly "S" entered into an agreement with the assessee under which the assessee agreed to reduce its share capital by Rs. 50 lacs by taking over from "S" the 50,000 shares at Rs. 100/- a share and "S" on his part agreed to forego cash payment and to receive instead debentures of the face value of Rs. 50 lacs carrying interest at 5 percent per annum "redeemable at the option of the registered holder at any time". The sanction of the High Court was obtained in due course and the agreement was carried out by the parties. The transaction was not challenged on the ground of fraud. The Income-tax authorities, the Appellate Tribunal and the Calcutta High Court took the view that in computing the income of the assessee the interest paid on these debentures could not be deducted under Section 12 (2) of the Indian Income-tax Act, 1922, on the ground (a) that it was not expenditure incurred for the purpose of earning the income, profits and gains of the assessee and (b) that even if it was so, it was at any rate not expenditure incurred solely for that purpose. To these facts, the question was whether 5% interest paid on the debentures to Lord Cable was deductible as out-going expenditure solely with a view to make profit.

Held, that it was admissible expenditure.

Principles (at page 56) :

1. *One of the points which weighed with the Income-tax Appellate Tribunal and the High Court was that though the conversion did not in any way disturb the holding of the investments of the company or interfere with the earning of its income, it had the effect of diminishing its taxable income. In our judgment, this is not a proper consideration when the transaction is not challenged on the ground of fraud. In the present case there is not even an allegation of fraud.*

2. *The test for present purposes is not whether the other party benefited, nor indeed whether this was a prudent transaction which resulted in ultimate gain to the appellant, but whether it was properly entered into as a part of the appellant's legitimate commercial undertakings in order indirectly to facilitate the carrying on of its business.*

(at page 7) :

3. *In principle, there appears to us no difference, if instead of paying in cash the payment of the price is in the shape of giving over shares of*

the company, when the transaction is not challenged on the ground of fraud and is approved by the Court in the reorganisation of the capital of the company. In our opinion, therefore, the ground on which the Income-tax Appellate Tribunal and the High Court disallowed the claim of the assessee is not sound.

Case No. 59

Fourth case of the Supreme Court is *Jiyajeerao Cotton Mills Ltd. v. C. I. T. & E. P. T., Bombay*, Ref. 34 I. T. R., page 888.

Fact 1 :— The assessee, a non-resident company, received the sum of Rs. 27,30,094/- in Gwalior (outside British India) during 1942-43. The assessee contended, that the amount represented profits made by it on certain forward contracts in cotton entered into in Gwalior with three brokers on the specific agreement that the goods were to be delivered and the price paid at Gwalior, and that the profits therefore accrued and were received wholly at Gwalior outside British India and were not liable to tax under the Indian Income-tax Act, 1922. According to the assessee, the orders for the sale or purchase of cotton were placed with the three brokers in Gwalior, who in turn placed the orders with a firm in Gwalior, which being a branch office of the firm J. K. in Bombay, communicated the orders received from the brokers to its head office in Bombay. Enquiry by the Income-tax Authorities revealed that the forward contracts had been entered into with the firm J. K. in person or by phone at Bombay and that the contract notes with the brokers were bogus transactions.

Fact 2 :—Facts found by the Income-tax Authorities are these:- The three brokers in whose names the contracts stood were, having regard to their means, not likely to have been thought of for contracts of the magnitude which we have. They had not done business in cotton futures prior to the present contracts nor subsequent thereto. They had no Bank accounts and large amounts to the tune of Rs. 30 lakhs are supposed to have been paid to them in cash by J. R. Pillani Gwalior, and turned over by them in cash to the appellant. They produced no accounts for their dealings and the ankdas produced by them at a late stage were found to have been freshly written up.

Fact 3 :— Arguments were advanced before the Supreme Court by Mr. Kolah advocate of the assessee that case had been remanded by the Income-tax Appellate Tribunal for recording statements of Birlas and the Manager with a view to find out the true facts relating to the transaction in dispute. The contention of Mr. Kolah was rejected by the Supreme Court on following ground :—

“If Birlas wanted themselves to give evidence, there was nothing to prevent them from doing so, and indeed, no complaint was made in the court below that their evidence had not been taken.”

Held, rejecting the contention of the assessee Supreme Court said, that it was a case where there was sufficient evidence against the assessee which if closely examined would give an idea that there was a device for evasion of tax.

Principle (at page 897) :

Mr. kolah argues that there is nothing wrong in business being done in such a way as to escape taxation. No exception can be taken to that statement. Every person is entitled so to arrange his affairs as to avoid taxation but the arrangement must be real and genuine and not a sham or make-believe,.... ..

Case No. 60

Fifth case of the Supreme Court is *C. I. T., Delhi & Rajasthan v. National Finance Ltd., Ref. 44 I. T. R., page 788.*

Fact 1 :— The assessee company was incorporated in the year 1943. The object was to deal in shares and financing. In the assessment year 1951-52, (accounting year May I, 1949 to April 30, 1950) the assessee company claimed on the sale of 3000 shares of Madhu Sudan Mills Ltd.. The loss which amounted to Rs. 5 lacs and odd as if it was a loss of revenue. The contention of the assessee was that when he sold these shares it was his stock-in-trade.

Fact 2 :— Yodhraj Bhalla in early year purchased a block of share which was 80 percent of the total share capital of Madhu Sudan Mills from one Mr. Bhadani at the price of Rs. 400/- per share. On that date the market price was Rs. 250/- per share.

Other shares were purchased by Yodhraj Bhalla in the name of Jaswant Sugar Mills Ltd. at the market rate, and Jaswant Sugar Mills Ltd. had to obtain finance from his other concerns.

Now, the assessee company purchased 15,547 shares from Jaswant Sugar Mills Ltd. on 9th Oct., 1948, at Rs. 400/- per share. On the same day, Jaswant Sugar Mills Ltd. sold 11,000 shares to National Construction and Development Corporation Ltd. at Rs. 400/- per share. Thus Jaswant Sugar Mills Ltd. unloaded its self of full holding of Madhu Sudan Mills Ltd..

Fact 3 :— That before Jaswant Sugar Mills Ltd. parted with the shares, they had appointed a new Board of Directors of the Madhu Sudan Mills Ltd. and these new Directors also belonged to the same group. The managing agency of Messrs. Bhadani Brothers Ltd. (Ex- Managing agents of Madhu Sudan Mills Ltd.) was terminated, and on the same day on which the shares were purchased from these managing agents, the assessee company was appointed as the purchasing and selling agent of the said Madhu Sudan Mills Ltd.

Now, on April 7, 1947, 4,500 shares were sold by the assessee company to the National Investment Trust Ltd. at Rs. 181/- per share resulting in a loss of Rs. 8,80,000/-, and on June 1, 1949, another block of 3000 shares was sold to the National Investment Trust Ltd. at Rs. 180/- per share, resulting in a loss of Rs. 5,86,312/-

Fact 4 :— The shares which were sold by the assessee company on the two occasions were sold to one Amrit Bhushan (a relative of Mr. Yodh Raj Bhalla) who sold them the same day to Messrs. National Investment Trust Ltd. at the slender profit of 8 annas per share which was brokerage.

The I. T. O. disallowed this loss of Rs. 5,86,312/8/- claimed by the assessee as revenue loss on the ground that it was a capital loss. The A. A. C. confirmed the assessment. The tribunal, however, decided that it was revenue loss on the ground that in the preceding year the assessee was successful in claiming the loss on the sale of this class of shares as a revenue loss. Direct appeal from the Appellate Tribunal Judgment was filed with the Supreme Court by the Commissioner which was entertained and the case decided on merits.

While accepting the Commissioner's appeal held that transaction when examined from facts placed on record by the Revenue authorities clearly indicate that it was a case of acquisition of managing agency and the shares were acquired at a price which was Rs. 400/- per share as against the market rate of share which was only Rs. 250/- per share. So the transaction of sale of shares could not be of stock-in-trade and the loss was, therefore, on the capital side.

Principle (at page 799-800) :

..... but we are not concerned with a theoretical question as to the assessee company being a separate legal entity, but with the question whether a particular loss made by the assessee company is a capital or a revenue loss. The two companies, i. e., Jaswant Sugar Mills Ltd. and the assessee company, were directed by the same set of persons, and the facts show that even though Jaswant Sugar Mills Ltd. temporarily acquired the shares, they conferred all the benefits of the acquisition upon the assessee company from the very first day. The assessee company also ultimately came into possession of all the shares along with another company, which was also directed by the same persons, and Jaswant Sugar Mills Ltd. went out of the picture within three months. In these circumstances, it is easy to see that the interposition of Jaswant Sugar Mills Ltd. was merely a device to secure the benefit of the English case, to which we have referred.

Note :— The case was very minutely examined by the Supreme Court from the point of view whether it was a device to claim loss as a revenue loss though in fact it was a capital loss. As a matter of fact what prevailed on the mind of the Judges of the Supreme Court was the inter-link of 6 companies owned by one Yodhraj Bhalla group and the following para in the judgment indicates the working of the mind of the Judges.

(at page 793) :

“Ganesh Finance Corporation Ltd. practically owns the assessee company and National Construction and Development Corporation Ltd. Raghunath Investment Trust Ltd. practically owns the Ganesh Finance Corporation Ltd., and “Yodh Raj Bhalla Group” practically owns Raghunath Investment Trust Ltd..

Jaswant Sugar Mills Ltd. is practically owned by Jaswant Straw Board Ltd., National Finance Ltd., and National Construction and Development Corporation Ltd., and Jaswant Straw Board Ltd., is practically owned by National Finance Ltd., and National Construction and Development Corporation Ltd. . Thus, the entire group is owned by a consortium, and there is no doubt about it."

Case No. 61

The sixth case of the Supreme Court is on the Principle "Device for Evasion of Tax if not Proved Salary or Commission payable to employee cannot be cut down."

In C. I. T., Madras v. Chari and Chari Ltd., Ref. 57 I. T. R., page 400.

Facts :— "A", "R" and "C" were the Directors of a company. It was doing certain business acting as managing agents and also took Government contracts. Each Director was getting Rs. 400/- per month salary. The special duties were entrusted by the Company to "A" to execute the Government contracts and he had to do the following :—

"In 'special charge' for arranging purchases of tobacco on credit, inspecting tobacco at Guntur and at Madras Port, and for supervising shipment of tobacco,....."

In consideration of the special services rendered he was to be paid 30% of the net profit as commission. The question was whether this amount was a reasonable payment and should be allowed as a revenue expenditure or not ?

Held, there was nothing to justify the disallowance of the amount paid to "A" as special commission at 30 percent. That the relationship of "A" with the other two, namely, "R" and "C", would not change the legal effect of payment if it was for Valid consideration. The special duties to which "A" attended in executing Government contrancts justify that the payment of 30% commission to him was fairly reasonable for the services rendered. Since there was no material or evidence on record to show that it was a case of device for evasion of tax in the hands of the payer; the disallowance of the emoluments paid to "A" could not be justified.

Case No. 62

In the seventh case on another occasion Supreme Court while deciding the case of *C. I. T., Bombay v. Walchand & Co. (Private) Ltd.*, Ref. 65 I. T. R., Page 381.

Held, that payment of increased salary to the Directors or the employees of the Company was to be examined from the point of view of the commercial expediency of the Company and there could be no cut down of the remuneration paid to them.

In this case, there were speedy increments given to the Directors and to the employees year after year, and the whole of the payment was treated by the Supreme Court as a business expenditure and allowed. Cutting down of the Salary by the Tribunal in their judgment was purely a non judicial action and arbitratry.

Case No. 63

That in the case of *Commissioner of Excess Profits Tax, Madras v. N. M. Rayaloo Iyer & Sons*, Ref. 41 I. T. R., page 671, the decision of the Supreme Court is somewhat different. It is based upon finding of facts of the Revenue authorities in respect of basic salary, dearness allowance and commission which was payable to the General Manager and other employees of the firm.

Facts :— The firm was acting as Distributors of Imperial Chemical Industries products with several branches. The remuneration payable to the manager of the branches was cut down by the Revenue authorities for the following reasons :—

- (a) "That the employees of the assesseees were being amply remunerated for services rendered by adequate salary, generous dearness allowance and annual bonus equal to the basic salary,
- (b) that the emoluments of the employees had been increased year after year and there was no material to show that the employees had made a persistent demand for increased emoluments,
- (c) that the commission was credited to the employees' account at the end of the year and was carried forward but no payments were made to them,
- (d) that the agreements which had been produced by the assesseees were fabricated with a view to reduce tax liability, and

- (e) that the expenditure claimed was not proved to have been laid out wholly and exclusively for the purpose of the business”.

The Tribunal confirmed the action of the Excess Profits Tax Officer who did not allow full payment to the employees as business expenditure. There were no reasons of commercial necessity and expediency. The Supreme Court agreed with the decision of the Appellate Tribunal.

Held, that High Court had no jurisdiction to sit in appraisal of the evidence afresh.

Principle of law laid down by the Supreme Court is as under :—
(at page 685) :

It is true that even if the assessee did not carry on the business through sub-distributors, payment made to its employees if reasonable and necessary having regard to the requirements of the business, may still be deductible but that in our judgment is a matter to be decided by the taxing authorities and not by us. The Tribunal had come to the conclusion that no payment in addition to the salary, annual bonus and special bonus was justified and any expression of opinion to the contrary in the supplementary statement pursuant to the order for statement of case could not in our judgment affect the conclusion originally recorded.

Note :— From clauses aforesaid (c), (d) and (e), it is clear that finding of facts of the Revenue authorities was that it was device for evasion of the tax.

Case No. 64

Legal Evasion

Though in a dissenting judgment it may be useful to note the observations made by Hon'ble Justice Shah in the case of *C. I. T., Madras v. Sivakasi Match Exporting Company*, Ref. 53 I. T. R., Page 204 which read as under :—

“It is always open to a person, consistently with the law, to so arrange his affairs that he may reduce his tax liability to the minimum permissible under the law. The fact that the liability to tax may be reduced by the adoption of an expedient which the law permits, is wholly irrelevant in considering the validity of that expedient.”

The majority judgment in this case has granted registration of the firm on the ground that Partnership Deed dated 1st. April, 1950,

which brought into existence a firm was not a bogus Deed but a genuine Deed and valid in law. If the firm is genuine no further jurisdiction lies with the Revenue authorities to refuse the registration of the firm.

Enquiry should be confined only to the extent whether the firm is genuine or bogus, not in existence.

Facts :— That in April, 1948, there was a firm of 5 partners. Four of them represented smaller concern and the 5th was the sole proprietor of the factory. This Partnership Deed of 1948 was refused registration on the ground that representative capacity was not recognised in law. That smaller firms could not be the partners in the larger partnership. On 1st. April, 1950, a new Deed was drawn between 5 individuals entering into a partnership. They were entitled to commission on all the 5 factories whether the sales were made through them or not. To provide capital money was borrowed by these individuals from their respective concerns. That three out of these 5 partners were sharing the profits with others by creating a sub-partnership. The Appellate Tribunal refused the registration of the firm. High Court granted the registration on the ground that the firm was genuine and there was valid partnership evidenced by Deed of 1st. April, 1950.

The Supreme Court affirmed the judgment of the High Court holding that creation of sub-partnership by individuals was not infringement of the Indian Partnership Act. Once the partnership is held to be genuine and rules for the registration of the firm complied with; Revenue authorities have no jurisdiction to refuse registration.

Case No. 65

Subsequently in *C. I. T., Madras v. Bagyalakshmi & Co.*, reported in 55 I. T. R., page 660, it has been held that where "A" and "B" were partners in $7\frac{1}{2}$ annas and $2\frac{1}{2}$ annas shares and were accountable for the profits of this firm to the divided members of their family though in the Deed of partnership they alone were shown as partners. The registration could not be refused as the firm was held to be absolutely genuine.

Principle of law (at page 664) :

A contract of partnership has no concern with the obligation of the partners to others in respect of their shares of profit in the partnership. It only regulates the rights and liabilities of the partners. A partner may be the karta of a joint Hindu family; he may be a trustee; he may enter into a sub-partnership with others; he may, under an agreement, express or implied, be the representative of a group of persons; he may be a benamidar for another. In all such cases he occupies a dual position. Qua the partnership, he functions in his personal capacity; qua the third parties, in his representative capacity. The third parties, whom one of the partners represents, cannot enforce their rights against the other partners nor the other partners can do so against the said third parties. Their right is only to a share in the profits of their partner-representative in accordance with law or in accordance with the terms of the agreement, as the case may be.

Thus the enquiry should be centred on the evidence in a particular case as to whether the transaction or the partnership is genuine or is bogus or it is a device for evasion of tax.

Case No. 66

Next case is *M. P. Davis v. Commissioner of Agricultural Income Tax*, Ref. 35 I. T. R., page 803, where the partnership agreement was placed before the Revenue authorities but it was found to be a cloak over the real intention which was that of creating a relationship of master and servant.

Facts :— That upto the assessment year 1951-52, the Appellant's brother was an Agent and would appear in the Tax Deptt. as such. He would also produce accounts and managed the estate belonging to the appellant. In 1952-53 assessment, it was claimed that the partnership had been brought into existence and the brother now is a partner, and that the appellant was no more the individual owner of the estate.

There were some other facts discovered by the Revenue authorities to show that real partnership was not brought into existence, i.e. (See at page 805) where it is observed —

“Even after change of status was pleaded for the assessment year 1952-53, ‘the appellant claimed loss of the previous year and full expenses of the accounting year against what he actually received during the accounting year 1951 - 52’; and so far as the books of account were concerned ‘they did not show change in the management of the estate in spite of the agreement’. These are findings of fact and though, in the absence of the account books and the other relevant material, it would be difficult for us to assess precisely the full significance of these findings, it cannot be denied that they are relevant for the purpose of ascertaining the real intention of the parties and their effect would be to a large extent against the appellant’s case and in favour of the view taken by the High Court.”

Question was whether the clause in the Partnership Deed led to the inference that there was partnership or that it was still a relationship of master and servant.

Held, that some of the clauses in the deed indicated that full control and powers were that of the appellant still and the relationship was not that of partners.

Principle of law (at page 806) :

We think that these provisions taken along with the conduct of the parties to the instrument earlier mentioned, clearly indicate that it was not the intention of the parties to bring about the relationship of partners but only to continue under the cloak of a partnership the pre-existing and real relationship, namely, that between a master and his servant.

Case No. 67

Dividends

In Indian Commerce & Industries Co., Ltd. v. C. I. T., Madras, Ref 60 I. T. R., page 229.

Appeal was filed in the Supreme Court against the judgment of Madras High Court and it was successful. The assessee a limited company declared dividend which was less than 60 percent. The I. T. O. ordered under Section 23 A of the Income-tax Act of 1922, and declared higher dividend. The assessee claimed that the commercial profits were less because of bad debt and reserves for contingent liabilities and taxes payable. Income-tax Appellate

Tribunal affirmed the I.T.O.'s order disagreeing with the assessee's contention.

Held, that the claim of the assessee was reasonable and justified and there was no evidence on record for coming to the conclusion that the assessee was avoiding proper payment of Income-tax by declaring a lesser amount of dividend than 60 percent and his claim for deduction of the items was also justified.

Case No. 68

Whether a document is a sale or exchange will depend upon the interpretation of the terms of the document. There was a transfer of asset in exchange of preference shares. The intention of the party was to treat it as a exchange, which Revenue authorities could not convert it into a sale. Following is the test in this case is in *C.I.T., Andhra Pradesh v. Motors & General Stores (P.) Ltd.*, Ref. 66 I. T. R., page 692.

Principle (at page 699) :

In the absence of any suggestion of bad faith or fraud the true principle is that the taxing statute has to be applied in accordance with the legal rights of the parties to the transaction. When the transaction is embodied in a document the liability to tax depends upon the meaning and content of the language used in accordance with the ordinary rules of construction.

Case No. 69

In M. M. Ipoh & others v. C. I. T., Madras, Ref. 67 I. T. R., page 106.

Principle of law laid down by the Supreme Court is as under :-
(at page 113) :

But for diverse reasons, assessment of the income of the association may not be possible or such assessment may lead to evasion of tax. It would be open to the Income-tax Officer then to assess the individual members on the shares received by them. The duty of the Income-tax Officer is to administer the provisions of the Act in the interests of public revenue, and to prevent evasion or escapement of tax legitimately due to the State. Though an executive officer engaged in the administration of the Act, the function of the Income-tax Officer is fundamentally quasi-judicial.

4

Cash Deposit & Explanation

Deposit means introduction of money in business books or investment by the assessee in some tangible or intangible assets. Cash deposits are treated as income from undisclosed sources where convincing explanation is not offered by the assessee. General principle as to the probability of the case has been discussed in "Chapter 2-Onus & Proof." While imposing tax one should bear in mind the principle of Supreme Court in *Aggarwal Chamber of Commerce Ltd. v. Ganpat Rai Hira Lal*, Ref. 33 I. T. R., page 245.

Observation (at page 252) :

The Fact is that, if the Income Tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found.

Once it is held that an amount credited in the account books of the assessee is the income of the assessee it is not necessary for the Department to locate its exact source.

In this background some of the decided cases of the Supreme Court will be examined. :—

Case No. 70

Affidavit

Where Book Entries are not found to be false and deponent not cross-examined, part of High Denomination Notes cannot be included as Income from Undisclosed Source.

In Mehta Parikh and Co. v. C. I. T., Bombay, Ref. 30 I. T. R., page 181.

Facts: — The appellant is a partnership firm doing business in Millstores at Ahmedabad with branch at Bombay. High Denomination Notes Ordinance came into force on 12th. January, 1946. Firm encashed 61 high denomination notes of value of Rs. 1000/- each on 18th. January, 1946. The Income-tax Officer, when made enquiries found that unless the assessee possess 18 high denomination notes on 1st. January 1946, and unless every receipt after this date was in high denomination notes, assessee cannot be deemed to possess 61 high denomination notes on 12th. January, 1946. Book entries were closely examined and the presumption was raised against the assessee's conduct. The Income-tax Officer included total notes of the value of Rs. 61,000/- as income from undisclosed sources. Thereafter appeal before the A. A. C. did not succeed though the assessee had filed certain affidavits. In the second appeal before the Income-tax Appellate Tribunal, 30 notes were included as income and 31 notes were deleted as if in possession of the assessee in his business cash balance on 12th. January, 1946. In the High Court the assessee did not succeed on the ground that the Tribunal findings were reasonable based on material before them. When the appeal came before the Supreme Court, it was observed that book entries of the assessee have not been found to be false. Scrutiny of the cash book was only to a Limited extent, and affidavits were produced before the A. A. C. but the deponents were not cross-examined. The contention of the Tribunal was based upon limited enquiry only. Appeal before the Supreme Court succeeded on the following:—

Principle of law (at page 187) :

It has to be noted, however, that beyond these calculations of figures, no further scrutiny was made by the Income-tax Officer or the Appellate Assistant Commissioner of the entries in the cash book of the appellants. The cash book of the appellants was accepted and the entries therein were not challenged. No further documents or vouchers in relation to those entries were called for, nor was the presence of the deponents of the three affidavits considered necessary by either party. The appellants took it that the affidavits of these parties were enough and neither the Appellate

Assistant Commissioner, nor the Income-tax Officer, who was present at the hearing of the appeal before the Appellate Assistant Commissioner, considered it necessary to call for them in order to cross examine them with reference to the statements made by them in their affidavits.

Note (Affidavit — its value of) :-

Unless it is found to be false or deponent is put to cross-examination and discrepancies discovered it cannot be said that assessee has failed to produce any evidence. Inference should be a reasonable inference depending upon the probabilities of the case and the evidence in the form of affidavits.

Case No. 71

Explanation believed-Gold sale

Statement by the Assessee believed by the Appellate Tribunal-It is the end of the matter-There is no Question of Law for Reference.

In Gouri Prasad Bagaria and others v. C. I. T., West Bengal, Ref. 42 I. T. R., page 112.

Facts :— That a sum of Rs. 72,523/- was entered in the account books of the assessee. Credit given to Ganesh Das Hanuman Prasad who was the father of the assessee. Entry was explained to be out of sale proceeds of gold. The Statement of the assessee was recorded. That the other explanations were also given regarding the acquisition of gold. Revenue authorities disbelieved the explanation and added this income as income from undisclosed sources. Appellate Tribunal believed the statement and deleted the amount from the assessment.

Held, that there was no question of law that could be raised.

Principle of law (at page 115) :

Where the assessee's statement is believed, there is obviously material on which the finding is based; and to seek for other material is tantamount to saying that a statement made by an assessee is not material on which a finding can be given. In our opinion, the Tribunal having believed the assessee's statement, there was an end of the matter in so far as that fact was concerned, and if the finding was based upon a statement which was good material on which it could be based, no question of law really arose.

Case No. 72

Explanation in part accepted

Partial Acceptance of Encashment of Notes as Capital and a part treated as Income from Undisclosed Source. Held, that there was no Material for rejecting the Explanation of the Assessee for the balance.

In Bai Velbai v. C. I. T., Bombay-City, Ref. 49 I.T.R., page 130.

Facts :— The assessee is a lady. Her husband died in 1931. She inherited lot of properties and business. She withdrew large moneys from Bank. She also broke her fixed deposit account which was for a sum of Rs. 5 lakhs. She gave an explanation that because of panic arising in 1942 as a result of second world war; she kept money at her home. Subsequently she re-deposited the same money in Bonds of the Municipal Board and kept money in other investments also. In January, 1946, she encashed 246 notes of the high denomination of the value of Rs. 1,000/- each. The Income-tax Officer accepted 8 notes as covered by the cash balance and he accepted Rs. one lakh as if available with the lady at her home from out of past savings and withdrawals. He treated the balance i. e. Rs. 1,38,000/- as income from undisclosed sources. A. A. C. in appeal did not accept the contention of the assessee. Tribunal also dismissed the appeal of the assessee. In the High Court it was held, that there was no question of law arising from the findings of the Tribunal. Before the Supreme Court it was contended that finding of the Tribunal is without taking into account the materials on record and is based mostly on guess work. In accepting the cotention of the assessee and allowing the appeal Supreme Court observed :—

Principles (at page 134—35) :

1. *We are of the view that learned counsel for the appellant has prima facie given good grounds for his contention that the finding of the Tribunal as to the sum of Rs. 1,38,000/- is based on no evidence; rather it is based on conjecture and surmise, and, further more, is vitiated by a failure to take into consideration several crucial matters bearing on the question.*

2. *We may first point out that the Tribunal has given no reasons of its own for making distinction between the sum of Rs. 1,00,000/- and the sum of Rs. 1,38,000/- out of the sum of Rs. 2,38,000/- received by*

the encashment of 238 high denomination currency notes; assuming that the Tribunal adopted whatever reasons the Income-tax Officer had given in his assessment order, it prima facie appears to us that with regard to the sum of Rs. 1,38,000 the Income-tax Officer has not referred to any particular materials on which he made a distinction between Rs. 1,38,000/- and Rs. 1,00,000/-

Note :— It will be thus clear that when part of the explanation is accepted and other part of explanation is rejected on mere guess work; it is not possible to accept the findings of the Tribunal as findings of fact. That there does arise a question of law.

Case No. 73**Explanation Rejected**

Where Cash Deposit is treated as Income from Undisclosed Source, rejection of Accounts also possible in Law.

In Kale Khan Mohammad Hanif v. C. I. T., Madhya Pradesh and Bhopal, Ref. 50 I. T. R., page 1.

Facts :— That the assessee was carrying on two businesses : one of general merchandise and the other of Bidis. For the assessment year 1945-46 and 1947-48, the original assessments were made by the Income-tax Officer by rejecting the version of the profit and applying certain percentage on sales. In assessment year 1948-49, the Income-tax Officer observed certain cash deposits in the books, appearing in the gold account and in the personal account all relating to the earlier years. He started reassessment proceedings for the year 1946-47 and 1947-48. In reassessment proceedings the explanation of the assessee given in support of the deposits was not accepted. Besides estimate of additional profits the cash deposit amounts were also included as income from undisclosed sources. Tribunal reduced the deposit income but held, that there was nothing illegal in taxing Cash deposit, as well as extra profits on rejection of account version.

Supreme Court agreed with the Tribunal's findings.

Principle (at page 4) :

It is well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he

disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the Income-tax Officer is entitled to treat it as taxable income : see A. Govindarajulu Mudaliar v. C. I. T., Ref. 34 I. T. R., page 807.

Note :— A similar case before the Supreme Court in '*C. I. T., Madras v. S. Nelliappan, Ref. 66 I. T. R., page 722*' was decided whether a cash deposit should also be included as income where extra profits have been taken by rejecting the account version of the assessee ? In this case Tribunal had taken the view that both the amounts should not be included in the assessment. In this case Supreme Court said that the view of the Tribunal was perfectly reasonable. (See 93 page *infra*)

Case No. 74

Inheritance

Explanation of the Assessee found to be unreliable – Tribunal findings was based on Materials so could not be disturbed.

In Sovachand Baid v. C. I. T., Ref. 34 I. T. R., page 650.

Facts :— The assessee encashed 268 high denomination notes when the Ordinance on 12th. January, 1946, was promulgated. His explanation was that it is an inheritance from his father. It is common ground that his father was a wealthy man. He received Rs. 6 lakhs, when retired from the business. That he was doing business upto 1926. Thereafter he retired and stayed in his native place where he died in 1942. The explanation of the assessee could not be accepted by the Appellate Tribunal because nature of account books, which the assessee had produced to show that the account books were maintained by his father but in those there was no record of the money receipt by his father on discontinuance of the business. Account books were such that they could have been written any time after 1926. There was no record in such books to show what happened before 1926. Thus the explanation of the assessee was rejected by the Tribunal and only some notes were included as income from undisclosed sources.

Held, that the findings of the Tribunal were based on materials on record. Secondly, if part of these notes were not included it was in fact concession given by the Tribunal which they could have easily

refused and they would have been justified in including the whole of the above amount as income.

Case No. 75

Inheritance

The explanation of the assessee having been rejected and surrounding circumstances when examined indicated that it was not convincing. The amount was rightly included as income from undisclosed sources. Inference was a reasonable inference. Held, that the direct appeal in Supreme Court is not permissible.

In A. Govindarajulu Mudaliar v. C.I.T., Hyderabad, Ref. 34 I.T.R., page 807.

Facts :— For the assessment years 1945-46, 1946-47 and 1947-48 the assessee had made deposits of Rs. 44,000/-, Rs. 27,500/- and Rs. 54,600/- and odd in his personal account. When called upon to explain the source of these deposits, he said that his father had made profit of Rs. 80,000/- in arrack business in 1936. Father left this money with assessee's aunt when he died. Aunt died in 1944 when the assessee got this money. For the other amounts the assessee said that in a partnership firm a sum of Rs. 42,000/- was earned as profits in the name of another person who was a partner but his benamidar. For both the items the explanations were rejected by the Income-tax Officer and cash deposits treated as income of the assessee from undisclosed sources. Before the A.A.C. the appeal was rejected. The Appellate Tribunal observed :—

“As the assessee has not succeeded in proving his version that Rs. 80,000/- was got from his aunt being given to her by his father and that Rs. 42,000/- was earned as his share of income from Adoni and Nandyal combines, there is no alternative left but to treat them as undisclosed income.”

The assessee did not move the High Court and did not pursue the matter further and instead filed a direct appeal in the Supreme Court against the judgment of the Appellate Tribunal.

Held, that though an appeal does lie in the Supreme Court, but in the present case, the assessee had not moved the High Court as such the matter ends there. However, they have laid down the

Principle of law which is as follows (at page 810) :—

Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswami Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000/- and the other being receipt of Rs. 42,000/- from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been, it was clearly open to the Income-tax Officer, to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature.

Case No. 76

Inheritance

Explanation tendered by the Assessee could not be accepted due to Surrounding Circumstances which appeared to be Unnatural-H. D. Notes included as Income from Undisclosed Source.

In Homi Jehangir Gheesta v. C.I.T., Bombay-City, Ref. 41 I.T.R., page 135.

Facts :— The assessee encashed high denomination notes for the value of Rs. 85,000/- and odd in January, 1946, when the ordinance of demonitisation of high denomination notes was promulgated. There was maternal grand-father who died in 1922, leaving behind a huge Estate. The assessee's mother received the Estate of the value roughly Rs. 3 lakhs under the will. Mother died in 1933 when the assessee was a minor. The assessee was looked after by his uncle as guardian. That the uncle when he died in 1945 left a box which when opened, these notes were found engraved with the name of the assessee as if it was his property left by his mother. When the assessee encashed these high denomination notes, he gave the following statements :—

“Legacy from my mother who died in 1933 when I was minor and money whereof was invested from time to time by my father and late uncle, Phirozeshaw, who recently died.”

Tribunal did not accept this statement and the explanation as genuine. So it was not proved to be capital receipt in the hands of the assessee. In the High Court, it was held, that there was no question of law that could arise from the finding of the Appellate Tribunal. Supreme Court affirmed High Court's decision on the following :—

Principle of law (at page 142) :

Indeed, we agree that it is not in all cases that by mere rejection of the explanation of the assessee, the character of a particular receipt as income can be said to have been established; but where the circumstances of the rejection are such that the only proper inference is that the receipt must be treated as income in the hands of the assessee, there is no reason why the assessing authorities should not draw such an inference.

Case No. 77

Inheritance & Partition

Member on Partition receiving Family Jewel sold and invested Money in Business Books but Explanation was supported by insufficient Evidence and contradiction, and production of Evidence at late stage – High Court could not Interfere with the Finding of the Tribunal.

In Lakhmichand Baijnath v. C. I. T., West Bengal, Ref. 35 I.T.R., page 416.

Facts :— In H. U. F., there was a partition. The terms of partition were recorded in the proceeding the book. In proceeding book there was narration of sale of family ornaments and jewels. Explanation was rejected on the ground that sales were all in round figures of 500 tolas and so on. Secondly, there was difference in the weight because according to the partition agreement it was 3,422 tolas and according to the purchasers certificate, it was noted to be about 3,133 tolas only. That the proceedings register was not produced in the lower court, but produced only for the first time before the Tribunal. That the Tribunal did not agree to entertain this new piece of evidence, coming at so late a stage. Question was whether the Revenue authorities could treat the amount as secret profits of the business in which the cash credits were made.

Held, that having rejected the explanation, the inference was

not unreasonable that the credits were income of the business in which the deposits had been made.

Principle (at page 422) :

Whether the sum of Rs. 2,30,346/- represents the price of family jewels sold or whether it is concealed business profits. That clearly is a question of fact which is open to attach in a reference under section 66 only if it could be shown that there is no evidence to support it or that it is perverse.

Note :— There have been cases where cash deposit is treated as income from undisclosed sources. But if the circumstances lead to the conclusion that it is income from business in which the deposit had been made, such an inference is also possible based upon evidence.

Case No. 78

Jewellery

Sale of Jewellery—Proof furnished cannot be disbelieved.

In Udhavdas Kewalram v. C. I. T., Bombay City-1, Ref. 66 I.T.R., page 462.

Facts :— The assessee migrated from Pakistan in 1947. It brought about Rs. 7 lacs. He made some investments and started business in Bombay. Deposits were made in the name of his wife in business books, being sale proceeds of gold and gold ornaments which were previously melted. The Income-tax Officer accepted the claim for Rs. 4 lacs as genuine and the balance were brought to tax in three different assessment years.

Appellate Assistant Commissioner in appeal held, that the documents produced by the assessee on migration from Pakistan and the documents of the melting of the gold, and gold ornaments were enough for holding that the deposits were genuine. He accordingly deleted these amounts from the respective assessments. Appellate Tribunal reversed A.A.C.'s finding on part of the evidence only which they considered. Reference was refused by the Appellate Tribunal. High Court also rejected the reference application, as in their opinion there was no question of law. When the case came before the Supreme Court, they found that there was some evidence relating to the sale of gold and gold ornaments and melting of gold ornaments. The

finding of the Tribunal that the explanation of the assessee was not probable, or that there was no convincing evidence regarding the sale of gold and gold ornaments, was a finding not based upon material already on record.

Supreme Court accepted the appeal of the assessee that a question of law did arise. Duties of the Appellate Tribunal are defined—See Chapter 7 *infra*.

Principle (at page 464-65) :

The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act : it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts, and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.

Case No. 79

Jewellery Sale & Proof

Evidence submitted in Penalty Proceedings could also be considered by Appellate Courts and any Appellate Order on consideration of some evidence only is Unfair.

In Omar Salay Mohamed Sait v. C. I. T., Madras, Ref. 37 I. T. R., page 151.

Facts :— The assessee was carrying on business in partnership with his mother upto the assessment year 1947-48. Thereafter he became sole proprietor. Nature of business was cloth merchant dealing in cloth, piece goods and yarn both on wholesale and retail basis at Madurai. There were two cash credits in the account books of the assessee as if money received from the Imperial Bank of India, Porbandar (Rs. 1,05,000/- by a Bank draft and the other from the Porbandar State Bank through the Central Bank of India Ltd. Bombay, representing Rs. 53,199/-). Both these amounts were credited in the account of Yamna Bai Ahamed, the maternal grandmother of Kathija Bai Habib, wife of the assessee. These amounts were treated as income from undisclosed sources. The assessee's contention was that due to communal disturbances which broke out in August, 1947, the said lady entrusted her golden ornaments to be sold which the appellant sold through

M/s. Shariff Hassan and Brothers and remitted the sale proceeds through Bank draft. In proof thereof he produced the original invoices of the sale before the I.T.O.. In the course of assessment proceedings, an affidavit of the lady in February 1947, was filed stating that she sold her ornaments. I. T. O. treated this affidavit as contrary to the one which she had filed in November, 1941, wherein it was alleged that all the ornaments were presented to her grand-daughter in her marriage.

The importance of this case is that in appeal proceedings lot of evidence was filed by the assessee in the form of affidavits that the draft money was from out of sale of ornaments. Sale proceeds were also substantiated in the affidavit. Lot of enquiries were made by the I. T. O. in the penalty proceedings i. e. by inspection, by recording statements and by direct reference made to the jewellers. These pieces of evidence were filed after the assessment had been made.

The Supreme Court set aside the assessment order with the direction that these materials should be considered in coming to the conclusion whether cash deposit represents income from undisclosed sources or not.

Principle (at page 170) :

We are aware that the Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings,

even though on questions of fact, will be liable to be set aside by this court.

Note :— The Supreme Court accordingly, on the facts, set aside the order of the Appellate Tribunal in this case and remanded the matter for reconsideration in accordance with law, on the ground that the Appellate Tribunal had improperly ignored the evidence gathered by the Income Tax Officer after the passing of the assessment order but before the appeal was decided i. e. in the course penalty proceeding then pending,

(Appellate Tribunal's Duty to consider all evidence — See Chapter 7)

Case No. 80

Onus & High Denomination Notes

High Denomination Notes encashed covered by Account Books—Cash Balance—No Burden upon the Assessee how he got it.

In Kanpur Steel Co. Ltd. v. C. I. T. (U. P.), Ref. 32 I. T. R., page 56 (Judgment of the Allahabad High Court which is approved by the Supreme Court)

Facts :— On 12th. January, 1946, cash balance of the assessee was Rs. 34,313/- in the business books. This is the date of Ordinance of Demonetisation of high denomination notes. The assessee encashed 32 currency notes of Rs. 1,000/- each and explained to the Income Tax Officer that it was covered by the cash balance in the business books. This explanation was rejected and the amount was treated as income from undisclosed sources. High Court took the view that the addition was unwarranted.

Principle (at page 61) :

that the burden of proof lay upon the Department to show that the sum of Rs. 32,000/-, represented by the 32 high denomination currency notes of Rs. 1,000/- each which were cashed by the assessee, represented suppressed income of the assessee from undisclosed sources. The burden was not on the assessee to prove how it had received those high denomination currency notes.

Case No. 81

Proof & High Denomination notes

Assessment should not proceed on mere Conjectures and Surmises —If the Explanation of the Assessee is reasonable and not Untrue Interpolation of entries Interpreted.

In Lalchand Bhagat Ambica Ram v. C. I. T., Bihar & Orissa, Ref. 37 I. T. R., page 288.

Facts :— The assessee was a grain-merchant. Its head office was at Sahibganj in the District of Santhal Parganas in the State of Bihar. One of its branch was at Nawgachia in the District of Bhagalpur and the other at Dhulian in the District of Murshidabad in West Bengal. It returned a loss of Rs. 46,415/- in the assessment year 1946-47. It encashed in January, 1946, high denomination notes of the value of Rs. 2,91,000/-. He explained that these notes were covered by the cash balance in the business books plus cash balance in the Almirah books. Almirah books are the central set in which he kept money after with drawing from the businesses. The explanation of the assessee was rejected inter-alia on the grounds :—

- (a) That the assessee was a big speculator.
- (b) That he was showing losses for the last two preceding years.
- (c) That he was a biggest grain merchant with chances of smuggling grain between Bihar and Bengal.
- (d) That in the almirah account, there were interpolation in the entries.
- (e) That its licence for Nawgachia branch was cancelled on the ground that stock register was not properly maintained.
- (f) That he was prosecuted by the Government under Defence of India Rules but acquitted on the ground of benefit of doubt.
- (g) That in the year under consideration, there was favourable market.

Assessee filed an appeal before A. A. C. which was rejected. In second appeal before the Tribunal there was a partial success and only 141 notes were included as income from undisclosed sources. The assessee's explanation was that entries were made out of sheer nervousness when the Ordinance had come into force. This explanation was not considered reliable by the Tribunal.

The Supreme Court of India allowed the appeal by holding that there was no evidence or materials before the Tribunal for finding that Rs. 1,41,000/- was an income from undisclosed sources.

Principles of law enunciated is as under (at page 295) :

1. We also observed in *Dhakeswari Cotton Mills Ltd. v. C. I. T.*, Ref. 26 I.T.R., page 775, that an assessment so made without disclosing to the assessee the information supplied by the departmental representative and without giving any opportunity to the assessee to rebut the information so supplied and declining to take into consideration all materials which the assessee wanted to produce in support of the case constituted a violation of the fundamental rules of justice and called for interference on our part.

2. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court.

(at page 299) :

3. If the entries in the books of account were genuine and the balance in Rokar and the balance in Almirah on January 12, 1946, aggregated to Rs. 3,10,681-13-9 and if it was not improbable that a fairly good portion of the very large sums received by the appellant from time to time, say in excess of Rs. 10,000/- at a time, consisted of high denomination notes, there was no basis for the conclusion that the appellant had satisfactorily explained the possession of Rs. 1,50,000/- in the high denomination notes of Rs. 1,000/- each leaving the possession of the balance of 141 high denomination notes of Rs. 1,000/- each unexplained.

(at page 301) :

[In referring to the *Kanpur Steel Co. Ltd. v. C. I. T.* (U. P.), Ref. 32 I. T. R., page 65), they say].

4. that the burden of proof lay upon the Department to prove that the sum of Rs. 32,000/- represented suppressed income of the assessee from undisclosed sources, and the burden was not on the assessee to prove how it had received these high denomination currency notes; for, until the Demonetisation Ordinance came into force high denomination currency notes could be used as freely as notes of any lower denomination and no one had any idea that it should be necessary for him to explain the possession of high denomination currency notes, the assessee had

naturally not kept any statement regarding the receipt of these currency notes, and it was for the first time on January 12, 1946, when the Ordinance came into force, that it became necessary for the assessee to explain its possession of these currency notes.

Note :— Since the subsequent making of entry in the account books was believed by the Supreme Court to be on account of sheer nervousness in as much as it did not alter character of account books or initial entries and it was also not a device, therefore, such entries cannot be called interpolation. The explanation if probably true Department should not reject it and burden shifts upon them.

(See Case No. 80 of *Kanpur Steel Co. Ltd.* now approved by the Supreme Court.)

Case No. 82

Reassessment

Cash Deposit – Entries in the Bank Pass Book if examined by the Examiner of Account—Could that be brought to Tax under Reassessment Proceedings.

In C. I. T., Bombay-North v. Lakhiram Ramdas, Ref. 44 I. T. R., page 726.

Facts :— The assessee had produced all the account books before the Income Tax Officer including the Bank account showing transaction of money from one place to another. These account books were also examined by the examiner of account and report submitted by him to the I. T. O.. Assessment was accordingly made. Subsequently I. T. O., after lapse of 4 years initiated re-assessment proceedings for bringing to charge income of Rs. 1,10,000/- which in his opinion escaped assessment. There was no disclosure of this Bank draft in the return. Assessee's contention was that there was no omission or failure to disclose fully and trully all material facts when the Bank pass book and every other account had been placed before the Income Tax Officer and the examiner of account. The Tribunal found that assessee's contention was correct.

Held, that notice was invalid in as much as that Tribunal had found as a fact that there was no omission or failure on the part of the assessee. The fact that the item was not shown in the return was no ground for reassessment proceedings being started.

Case No. 83

Reassessment

High Denomination Notes not reasonably explained—Onus is not discharged and inclusion in the assesment is justified.

In Shreelekha Banerjee & Others v. C. I. T., Bihar & Orissa, Ref. 49 I. T. R., page 112.

Facts :— The assessee was leading coal merchant and owner of Collieries in Bihar. For the assessment year 1946–47 his business income was only assessed. Later, reassessment proceedings were started on the ground that income escaped assessment. In reassessment proceedings sum of Rs. 51,000/- was taken as income from undisclosed sources being encashment of high denomination notes. When he was asked to explain as to how he got this amount, he gave the following explanation :—

“I am engaged in business as Colliery proprietor, contractor, under Messrs. Kilburn & Co. in the name and style of H. P. Banerjee and Son and also under the State Railway Bokaro, Swang, Hazaribagh district, in the name of Jharia Dhanbad Coal & Mica Mining Co.....For conducting the business and payment to labour I have to pay every week between 30-40 thousand. As I did not get payment for work done every week I had to keep large sum of money to meet emergencyIt is neither profit nor part of profit—It is very floating capital for purpose of conducting business. It is not an excess of profit.”

Income-tax Officer discovered in the assessment proceedings that Bank accounts were not incorporated in the account books which he had produced and there were discrepancies in different accounts. So he assessed the sum as income from undisclosed sources. The case when came before the High Court, reference was answered against the assessee and held, that the inclusion of this amount was fairly on reasonable grounds.

Supreme Court agreed with High Court.

Principles (at page 120) :

1. As we have said earlier, the burden of proof must depend on the facts of the case. One such fact may be the existence of a large floating cash balance on hand, and taken with other facts, may be sufficient to show that the high denomination notes constituted the whole or part of that balance.

2. *It seems to us that the correct approach to questions of this kind in this. If there is an entry in the account books of the assessee which shows the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money is and to prove that it does not bear the nature of income. The department is not at this stage required to prove anything. It can ask the assessee to bring any books of account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the receipt was not of an income nature, the department cannot act unreasonable and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source.*

NOTES

1. All these above principles have not been materially altered even though Sections 68 and 69 have been incorporated in the Income-tax Act of 1961. If it is book deposit previous year may be accounting year of the business (Section. 68). If it is other investment outside business books, it may be financial year (Section 69).

2. Generally speaking, when on an examination of the books of account of a business, a particular amount is determined as representing undisclosed profits, and there is also an aggregate amount of cash credits which are suspected to represent undisclosed profits, the Department should add to the total income the greater of the two amounts but not both, since the cash credits would themselves represent the undisclosed profits,—unless there is some material to indicate that the cash credits represent the secreted profits of another independent business or other source of income. The same principle applies in cases where the Department rejects the assessee's books which contain cash credits and computes his business profits at a flat rate. But this principle is not universal, and the facts may justify the estimate of the business profits on a percentage basis and at the same time the addition of the cash credits.

5

Evidence & Explanation

It is not true to say that Income-tax assessment proceedings are not judicial proceedings and the evidence as required in civil litigation is entirely different from the evidence which is needed for framing tax assessments. Technical evidence may not be necessary to establish the charge but proceedings cannot be arbitrary. Local enquiry private reports may all be evidence provided opportunity was afforded to the assessee before framing the assessment. Documentary evidence and its interpretation etc. are the subject dealt hereinafter.

Case No. 84

Affidavit

Affidavit and other Evidence not considered by the Tribunal-Case Remanded.

In C. I. T., Bombay City-1 v. Greaves Cotton & Co. Ltd., Ref. 68 I. T. R., page 200.

Facts :— There was a payment of 18 lacs on termination of the Managing Agency. The bonafides of expenditure was disputed. Appellate Tribunal rejected the contention of the assessee but the High Court accepted the evidence and reversed Appellate Tribunal's judgment. Supreme Court observed to say that High Court cannot sit in appraisal of the evidence afresh. However, the Tribunal's judgment was set aside by the Supreme Court on ground that affidavit given to the Tribunal by the assessee and the statement of account given to the A. A. C. in appeal were ignored. The material fact on which assessee had relied was the affidavit

which had set out the circumstances about the bonafides of the transaction of the termination of the Managing Agency and payment of compensation of Rs. 18 lacs. Mr. Kolah in the argument stressed that Rs. 16 lacs out of Rs. 18 lacs were recouped as a measure of termination within seven years. This solid material was not given due weight by the Tribunal so the judgment of the Tribunal was set aside.

Note :— Importance of the affidavit has also been examined by the Supreme Court in *Mehta Parikh's case*—See Case No. 70 in Chapter 4.

Case No. 85

Blending of self acquired Property

Whether the Minor received the Property from his Father by a Transfer (Gift) or by Partition—Minor's Income could not be included in that of the Father if it was a case of Partition—Proof given by the Father of Blending the Property in common hotch potch accepted.

In C. I. T., Madras, v. M.K. Stremann, Ref. 56 I. T. R., page 62.

Facts :— Assessee maintained one set of accounts from the year 1938 upto 1952 in which he recorded all the income—whether from business or property – and got himself assessed as an individual. In 1938, he inherited some money from his father with which he purchased the properties. In the years 1944 and 1945, sons were born to him. By a deed, he made a declaration to the following effect :—

“Whereas (the assessee) has been earning commission and acquiring properties and blending his money with the assets inherited from his father and treating the entire properties extant before and after the birth of (the sons) till this date as joint family property without making any discrimination or distinction”

The question was whether self acquired property was indirectly transferred to his minor sons by way of gift.

Held, no. It was a case of partition and not a transfer as evidenced by the aforesaid deed.

Note :— Self acquired property having being thrown into common hotch potch as evidenced by the deed of partition; there was no other proof necessary for holding that it was a case of partition of the properties. It was not a case of transfer of an

asset by an individual to his minor sons indirectly by means of this blending. Deed of declaration was sufficient evidence for coming to the correct conclusion. Assessment made in the past in the status of an individual were of no consequence.

Case No. 86**Commencement****Business establish and set up—Depends upon Facts and Evidence**

In Travancore-Cochin Chemicals(P.) Ltd. v. Commissioner of Wealth Tax, Kerala, Ref. 65 I. T. R., page 651.

Appellate Tribunal gave the following findings :—

“This new company took over the plant, machinery, buildings, construction stores, materials, etc., at different stages of erection and also all book debts and liabilities. The erection and construction of the factory was completed in December, 1953, and production commenced from January 1, 1954. The trading accounts were closed for the first time on March 31, 1954. There was a loss of Rs. 16,04,212/- incurred.”

High Court gave answer against the assessee by up—setting Tribunal's decision. Assessee appealed in the Supreme Court and succeeded on following accepted principles :—

Principles (at page 654) :

1. A unit cannot be said to have been set up unless it is ready to discharge the function for which it is being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up.

2. Operations for the establishment of a unit, from the very nature of that expression, can only signify steps that have to be taken to establish the unit. The word “set up” in the principal clause, in our opinion, is equivalent to the word “established”, but operations for establishment cannot be equated with the establishment of the unit itself or its setting up.

(at page 655) :

3. This is also the meaning that the Bombay High Court derived in the case in *Western India Vegetable Products Ltd.*, Ref. 26 I.T.R., 151 at page 158, where that court was concerned with the interpretation of the

expression "set up" as used in section 2 (11) of the Income-tax Act. That court held : "It seems to us that the expression 'setting up' means, as is defined in Oxford English Dictionary, 'to place on foot' or 'to establish', and in contradistinction to 'commence'. The distinction is this that when a business is established and is ready to commence business, then it can be said of that business that it is set up. But before it is ready to commence business it is not set up." This view was expressed when that court was considering the difference between the meaning of the expression "setting up a business" and "commencing of a business".

Note :— The above case is under the Wealth Tax Act but meaning of the word "set up" and "commencement" is almost the same as it is understood in the Income Tax Act. Bombay judgment in 26 I. T. R., page 151, fully approved and also Ref. 63 I. T. R., page 478, for this matter.

Case No 87

Date

Letter by the Father to Son whether Evidence of Transfer—Held, it is not—It was just a Proposal—Gift was held to be Within two years.

In Controllor of Estate Duty, Gujarat v. H. H. Iqbal Mohamed Khan, Nawab of Palanpur, Ref. 66 I. T. R., page 484.

Facts :— The assessee sold the property for Rs. 15 lakhs to the Government. It took 5 lakhs and the balance was payable by the Government in instalments. On May 3, 1955, the assessee wrote a letter to his son whereby he expressed his intention to affect in his favour a transfer of Rs. 9 lakhs against Rs. 10 lakhs which he had to recover from the Government so that monthly allowance which he was paying to his son would come to an end. There were some proposals also in this letter. Letter to the Government was written by the assessee in September 19, 1955, for handing over Rs. 9 lakhs to his son. Assessee died on May 17, 1957. Question was whether the gift of Rs. 9 lakhs was made effective from 3rd. May, 1955 or from September 19, 1955. Since gifts within two years are taxable.

Held, that effective date of the transfer within the meaning of Section 130 of the Transfer of Property Act was September 19, 1955. Letter of May 3, 1955, was just a proposal and not a transfer. Therefore, the charge of tax on Rs. 9 lakhs in the Estate Duty was

proper. Transfer must be legally effective, otherwise it is not recognised in law.

Case No. 88**Deed of Relinquishment Genuineness.**

In C. I. T., West Bengal v. Juggilal Kamalapat, Ref. 63 I. T. R., page 292.

Facts :— That three partners 'A', 'B' and 'C', retired from the partnership by a relinquishment deed drawn up. Firm was possessed of movable and immovable properties both. Oral agreement was entered into in March, 1942, between one Saraf and a Trust which succeeded to the shares of 'A', 'B' and 'C' on their retirement. Deed was executed in December, 1942. Registration of the firm was refused. However, Appellate Tribunal granted registration.

Held, that the partnership between the trust and Jhabbarmal Saraf was valid in law, and firm could be registered under Section 26 A of the Act 1922.

The question whether, in fact on the evidence, a firm had been constituted and came into existence, is a pure question of fact on which the decision of the Tribunal is final and no reference to the High Court would lie.

Principle (at page 299) :

A deed of relinquishment is in the nature of a deed of gift, where the various properties dealt with are always separable, and the invalidity of the deed of gift in respect of one item cannot affect its validity in respect of another.

Case No. 89**Enquiry by I. T. O.**

Evidence collected by the Commissioner behind the back of the Assessee can be used after affording Opportunity.

In Rampyari Devi Saraogi v. C. I. T., West Bengal, & others, Ref. 67 I. T. R., page 84.

Facts :— From the assessment years 1952-53 upto 1960-61 assessments of the assessee were made in haste by the Income-tax Officer. Income-tax Officer had jurisdiction to make the assessments over the assessee's whose name began with the words from 'S', to 'Z'. Assessee's name began with the word 'R' but he camouflaged his

name and submitted return to show as if his name began with the word 'S'. No enquiry was made by the Income-tax Officer regarding capital and gifts. Such hasty assessments were cancelled by the Commissioner. Question was whether Commissioner could act on local enquiry and other additional materials before him and cancel the assessments.

Held, that because opportunity had been given to the assessee it could not be said that natural justice was denied to him. In relying upon additional material there is no ground for holding that Commissioner travelled beyond his powers and is not justified in cancelling the assessment. Local enquiry behind the back was only an additional material which showed that assessee never resided at the place and never carried on the business which he disclosed in the return. Assessee could not take advantage of his own device.

Note :— In submitting the return under a wrong nomenclature with a view to bring his own assessment before a particular Income-tax Officer who did not possess jurisdiction over that assessee was undesirable.

Case No. 90

Firm Fictitious

Appellate Tribunal Order sentence by sentence not necessary—Evidence if used by Tribunal—It is a finding of fact.

In Bhaichand Amoluk & Co. v. Commissioner of Income-tax, Bombay City-1, Ref. 44 I. T. R., page 511.

Facts :— 'A', his son 'B' and one outsider constituted a firm who were acting as agents of Insurance Company. Subsequently 'A' died; 'B' and 'P' reconstituted the firm. In 1948, 'P' died and 'B' took his wife as a partner. Firm's registration was not granted by the Department. In 1953, 'B' and his wife both did not come into the picture of a new firm which took over the old business and consisted of new set of partners, viz. B's mother, B's two minor children and two working partners. The firm was declared as not genuine and registration was refused. Appellate Tribunal's finding was based upon solid materials but at places conjecture was also used.

Question was whether question of law arose from the findings

of the Tribunal which was partly on evidence and partly on conjectures and suspicion.

The Supreme Court took the view that there were genuine circumstances on which Tribunal could come to a finding that the firm was a fictitious one. For example on retirement there were no entries in the account books that mother became a partner and wife disappeared completely; that there was no intimation given to the Insurance Company regarding the change in the constitution and so on so forth. Therefore, no question of law arose from the judgment of the Tribunal.

Principle of law (at page 511) :

Where an application is made to the High Court to require the Appellate Tribunal to refer to the High Court the question whether the finding of the Tribunal that a partnership is not genuine is based on any materials or is based on conjectures and surmises, the order of the Tribunal must be read as a whole to determine whether every material fact, for and against the assessee, has been considered fairly and with due care; whether the evidence pro and con has been considered in reaching the final conclusion; and whether the conclusion reached by the Tribunal has been coloured by irrelevant considerations or matters of prejudice. It is not however necessary that the order of the Tribunal must be examined minutely, sentence by sentence, so as to discover a minor lapse here or an incautious opinion there to be used as a peg on which to hang an issue of law.

Though the Tribunal would be well-advised to leave out altogether speculation and surmises, the mere fact that the Tribunal has also referred to some additional reasons which may be characterised as surmises, would not give rise to a question of law, if the finding is based on such solid facts that the surmises would not make any material difference to the finding.

Note :— Nature of character of judgment of Tribunal when can be challenged in the High Court and when it is supposed to raise a question of law has received the attention of the Supreme Court a number of times. The principle reproduced above is the sure guide in determining the merits of the Tribunal's judgment.

Case No. 91

Gift

Payment to Ex-Employee was treated as Gift and not in consideration of his past services.

In Mahesh Anantrai Pattani & another v. C. I. T., Bombay North, Ref. 41 I. T. R., page 481.

Facts :— That Rs. 5 lacs were paid by cheque to the assessee, the Chief Dewan, by the Maharaja, after Bhavnagar merged into the Saurashtra State. This Diwan served the Bhavnagar State for the years between 1937 to 1948. On retirement he was given pension of Rs. 2,000/- per month, i. e. the amount which was the same as his salary. When enquired by the accountant, the Maharaja made the following orders :—

“In consideration of (the assessee), the ex-Dewan of our Bhavnagar State having rendered loyal and meritorious services Rs. 5 lacs are given to him as gift. Therefore, it is ordered that the said amount should be debited to our personal expense account”.

The assessability to Income-tax of this amount of Rs. 5 lacs was raised in the course of the proceedings for the assessment year 1951-52. At the request of the assessee, the Maharaja wrote the following letter on March 10, 1953 :

“I confirm that in June, 1950, I gave you a sum of Rs. 5 lacs which was a gift as a token of my affection and regard for you and your family. This amount was paid to you by Premchand Roychand & Sons according to my letter of May 31, 1950, from moneys in my account with them.”

The Income-tax authorities as well as the Appellate Tribunal relied on the Maharaja's letter dated December 27, 1950, to which they attached more importance and which they treated as a contemporaneous document, and disregarded the letter dated March 10, 1953, Tribunal held, that the amount was a taxable receipt in the hands of the assessee under Section 7 (1) of the Income-tax Act, read with Explanation 2 (before amendment in 1955). On a reference the High Court affirmed the decision of the Appellate Tribunal. On appeal, the Supreme Court laid down the following :

Principles (at page 485) :

1. Tribunal was in error in treating the document of December 27, 1950, as a contemporaneous document and because of this erroneous approach the finding that it has given cannot be treated as a finding of fact which should bind the court in its decision.

(at page 490) :

2. *In our opinion, the sum of Rs. 5,00,000 was not paid to the assessee in token of appreciation for the services rendered as a Dewan of Bhavnagar State but as a personal gift for the personal qualities of the assessee and as a token of personal esteem.*

Case No. 92

Goodwill

Evidence and Circumstances—Value of Good will—It is Question of Law.

In S. C. Cambatta & Co. (Pvt.) Ltd. v. Commissioner of Excess Profits Tax, Bombay, Ref. 41 I. T. R., page 500.

The question arose whether valuation of good will was a question of law.

Held, it was a question of law. The circumstances to be considered and the nature of evidence to be examined for determination of the value of good will, are the following:

Principle (at page 505) :

... the goodwill of a business depends upon a variety of circumstances or a combination of them. The location, the service, the standing of the business, the honesty of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill, though locality, always plays a considerable part. Shift the locality, and the goodwill may be lost. At the same time, locality is not everything. The power to attract custom depends on one or more of the other factors as well. In the case of a theatre or restaurant, what is catered, how the service is run and what the competition is, contribute also to the goodwill.

Case No. 93

Information

Events and Facts which bring knowledge to the I. T. O. is information—For Reopening the case—Notice was not invalid.

In Chatturam Horilram Ltd. v. C. I. T., Bihar and Orissa, Ref. 27 I. T. R., page 709.

Facts :— The assessee company carrying on business in

Chota Nagpur was assessed to tax for the year 1939-40 but the assessment was set aside by the Income-tax Appellate Tribunal on 28th. March, 1942, on the ground that the Indian Finance Act, 1939, was not in force during the assessment year 1939-40 in Chota Nagpur which was a partially excluded area. On a reference, under Section 66, the High Court agreed with the view of the Appellate Tribunal by its judgment dated 30th. September, 1943. On 30th. June, 1942, Bihar Regulation IV of 1942 was promulgated by which the Indian Finance Act of 1939 was brought into force in Chota Nagpur retrospectively as from 30th. March, 1939. The Income-tax Officer passed on 8th. February, 1944, an order that the income of the assessee for the year 1939-40 had escaped assessment and issued to the assessee on 12th. February, 1944, a notice under Section 34. The question was whether this notice was valid :

Held, That the promulgation of the regulation and the decision of the High Court were objective facts, information regarding which became available to the Income-tax Officer when he passed the order dated 8th. February, 1944, and it was only when these facts came to his knowledge that the Income-tax Officer could be said to have discovered that chargeable income escaped assessment in the year 1939-40.

Case No. 94**Object in the Article of the Company**

In C. I. T., West Bengal v. Calcutta National Bank Ltd., Ref. 37 I. T. R., page 171.

Facts :— The assessee, which was a banking company in a large way of business, owned a six - storeyed building where its offices were located on the ground floor and a part of the sixth floor, while the rest of the building was let out to tenants.

Question arose whether rental income enjoyed by the assessee company would be its business income and liable to Excess Profits-tax.

Held, yes. It is business income because of the objects of the company which are reproduced below :

(at page 175) :

1. To carry on all kinds of banking business that are generally carried on by joint stock banks.....

2. *To carry on the business of banking in all its branches and departments, including borrowing, raising or taking up money, the lending or advancing money, securities or properties; ... the acquiring, holding, issuing and dealing with ... investment of all kinds; ... the managing of properties*

3. *To purchase, take on lease or in exchange or otherwise acquire any moveable or immoveable property which the company may think necessary or convenient for the purpose of its business, and to construct, maintain and alter any buildings or works necessary or convenient for the purpose of the company.*

Case No. 95**Object in the Article of the Company.**

But there is another case of the Supreme Court *Kishan Prasad & Co., Ltd., v. C. I. T., Punjab*, Ref. 27 I. T. R., page 49, in which opinion is different.

Facts :— That the company was formed in 1917 with the objects, inter alia, of carrying on the general business and trade of commission agents and bankers, undertaking the management of commercial undertakings and dealing in bills, hundies and other securities. In 1933 Kishan Prasad on behalf of the assessee purchased shares of the value of Rs. 3,00,000/- of a sugar syndicate and promised to sell shares of the value of Rs. 2,00,000/- in the market. There was an arrangement regarding third sugar mills which when erected the assessee would be given the managing agency of the same. Otherwise they will get commission. From the correspondence of two letters, only inference was possible that purchasing of the shares was with the sole object of acquiring the managing agency of a third mill. It was the capital asset. In 1940 Kishan Prasad died. Managing agency arrangement fell through. The shares of the syndicate possessed by the assessee were sold in 1941 and 1943 resulting in a profit of Rs. 2,00,000/- which was held by Supreme Court to be a capital appreciation and not revenue profits.

Reversing the judgment of the High Court, Supreme Court held, that object in the articles of the Company is not conclusive for determining whether the transaction of purchase or sale of shares is of capital or of revenue character.

Observed (at page 52-53) :

The exact nature of the business which the assessee company was doing is admittedly not clear from the record but it is not denied that the memorandum of association of the assessee company did not authorise it to purchase and/or sell shares as dealers nor is it denied that beyond this isolated transaction of purchase and sale the assessee company did not deal in shares.

Case No. 96**Partnership**

Guardian Agreeing on behalf of the Minor in the Deed of Partnership-Whether Evidence of making the Minor fullfledged Partner.

In C. I. T., Mysore v. shah Mohandas Sadhuram, Ref. 57 I. T. R., page 415.

Question arose whether partnership deed was valid in which guardian of the minor also signed the deed of partnership.

Held, it was not an in-valid document. The concent of the guardian was only to ensure the benefits given to the minor on admission in the partnership. Signatures do not make the minor a fullfledged partner.

Case No. 97**Partnership**

Partnership was held to be Genuine.

In Umacharan Shaw & Bros. v. C. I. T., West Bengal, Ref. 37 I. T. R., page 271.

Facts :— There were three liquor shops owned by H. U. F. . Subsequently there was partition. Department refused to accept the partition and did not recognise the firm as genuine. Partners maintained a Bati Khata for recording profit, division of profit and capital. After six years the firm was reconstituted by legal heirs of the deceased partners. The registration was rejected by the I.T.O. on the grounds that there was no separate capital account of the partners and that the share of profits of each partner was not credited in his account in the ledger. The officer placed no value on the Bati Khata maintained by the partners. The Tribunal affirmed the decision of the Officer holding that there was no genuine partnership especially as the existence of the partnership was not disclosed to the bankers or to the excise authorities who issued the licence for the

shops and the formation of the partnership was in violation of the Bengal Excise Act, 1911.

Held, on the facts:

1. that there was no evidence of transgression of the provisions of the Bengal Excise Act, 1911, and there was nothing affecting the validity of the partnership;

2. that there was nothing to establish that the Bati Khata which showed the capital account of the partners was not genuine or that it was not regularly maintained in the ordinary course of business;

3. that the maintenance of the bank accounts in the names of the holders of the excise licences and not in the name of the firm, was in accordance with the provisions of the partnership deed and could not be said merely to furnish a veneer of partnership while the family continued without disruption;

4. that the earlier decision of the year 1939—40 was not res judicata and the members could on a subsequent date enter into a fresh agreement and ask for registration of the firm;

5. that there was no material on which the Income-tax Officer or the Appellate Tribunal could come to the conclusion that the firm was not genuine; there were many surmises and conjectures, and the conclusion was the result of suspicion which could not take the place of proof.

Case No. 98

Presumption

In Erin Estate, Galah, Ceylon v. C. I. T., Madras, Ref. 34 I.T.R., page 1.

Facts :— When 7 partners of the firm are residing in this country and the business of the firm is managed by the manager in Ceylon, there is a presumption that some part of the control was exercised by the partners. This presumption is rebuttable by the assessee.

In the present case assessee's appeal before the Supreme Court was dismissed on the ground that presumption was not rebutted by the assessee to establish full control outside taxable territory.

Principle (at page 6-7) :

Prima facie the material clause in the partnership deed and the evidence adduced in regard to the general management of the affairs of the estate are no doubt in favour of the appellant; but it has been held by the High Court that the correspondence produced in the case conclusively showed that the control and management was not wholly situated in Ceylon and that at least a part of the control and management was situated in India because the partners who resided in the District of Tiruchirapalli are shown to have exercised control and management of the affairs of the firm from time to time.

Case No 99**Private Enquiry**

It may be used if Opportunity was given.

In C. Vasant Lal & Company, v. C. I. T., Bombay City, Ref. 45 I. T. R., page 206.

Facts :— The assessee filed an appeal in the Supreme Court against the judgment of Bombay High Court, and the appeal was unsuccessful. In this case, it was found as a fact that enquiry was made behind the back of the assessee and two witnesses were examined, the Appellate Assistant Commissioner gave opportunity to cross examine the two witnesses.

The question before the Supreme Court was whether the Tribunal could act upon that material which was recorded by the Income-tax Officer behind the back of the assessee.

Held, in the present case, it could be relied upon.

Principle (at page 209) :

The Income-tax Officer is not bound by any technical rules of the law of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, the assessee must be informed of the material and must be given an adequate opportunity of explaining it.

Case No. 100**Report**

Report of the Investigation Commission whether Evidence – Technical Rule of Evidence Act how far Applicable in Income – tax Act–Opportunity to rebut allowed

*In C. I. T., West Bengal v. East Coast Commercial Co. Ltd ,
Ref. 63 I. T. R., page 449.*

Principles (at page 457) :

1. We may observe that the High Court appears to have felt some doubt as to the admissibility of the Report of the Income-tax Investigation Commission. But the Income-tax authorities are not strictly bound by the rules of evidence, and the mere fact that certain provisions of the Taxation of Income (Investigation Commission) Act relating to the inquiries to be held were declared to be ultra vires by this court did not render the Commission an unlawful body; and in any event the admissions which are recorded by the Commission, as having been made before them, cannot be ignored. The report had evidentiary value and could be taken into account. Undoubtedly the Report had to be brought to the notice of the company, and the company had to be given an opportunity to make its representation against the report and to tender evidence against the truth of the recitals contained therein. It is not suggested that this opportunity was not given. It was for the Tribunal to determine having regard to ordinary human experience whether it may be safely taken that the members of the Kedia family must have acted together as a controlling block. That enquiry has not been made, and the case has been decided on the application of a test which is erroneous.

2. if the members of the Kedia family formed a block and held more than seventy-five percent. of the voting power, it was not necessary to prove that the actually exercised controlling interest. It is the holding in the aggregate of a majority of the shares issued by a person or persons acting in concert in relation to the affairs of the company which establishes the existence of a block. It is sufficient, if having regard to their relation, etc., their conduct, and their common interest, that it may be inferred that they must be acting together : evidence of actual concerted acting is normally difficult to obtain, and is not insisted upon.

Case No. 101

Resjudicata

Finding based upon Materials—Previous Assessment not Resjudicata—Share-dealing—Whether Investment or Stock Entry.

*In Dwarkadas Kesardeo Morarka v. C. I. T., Central Bombay,
Ref. 44 I. T. R., page 529.*

Facts :— That the assessee was treated as dealer in shares and so assessed in one assessment year. In subsequent years the Revenue authorities did not allow loss on the ground that the shares were not stock-in-trade but investment. Action of the revenue was upheld on the following dictum :

Principles (at page 531-32) :

1. *The conduct of the appellants clearly indicated that even though they were dealing in shares of other companies, the shares of the Sholapur Mills were treated by them as capital investment for the purpose of maintaining their managing agency. The number of shares held by the appellants went on increasing from time to time and not a single share was ever sold*

(at page 532)

2. *The conclusion of the Tribunal was amply supported by evidence. It cannot be said that because in the previous years the shares were held to be stock-in-trade, they must be similarly treated for the assessment year 1949-50. In the matter of assessment of Income-tax, each year's assessment is complete and the decision arrived at in a previous year on materials before the taxing authorities cannot be regarded as binding in the assessment for the subsequent years.*

Note :— That in *C. I. T., Delhi and Rajasthan v National Finance Ltd*, Ref. 44 I. T. R., page 788: See *Supra* Chapter 3, it was held, that sale of shares resulted in a capital loss though in an earlier year, Tribunal had held, that it was a revenue loss.

Case No. 102

Same Business

Life Insurance Business and General Insurance Business whether same Business—Evidence necessary—Set off of Loss of one Business allowed in another Business

In C. I. T. Madras v. Prithvi Insurance Co. Ltd., Ref. 63 I. T. R., page 632.

Facts :— The Insurance Company was carrying on business of Life insurance as well as of General and Fire. There was one administration, one general manager and one staff controlling both the businesses. After the business of Life insurance was taken over by L. I. C. of India; they continued to carry on the General and Fire insurance businesses.

Question was whether the losses, and the unabsorbed losses of Life insurance, could be carried forward and given a set-off against the profits of General insurance in the subsequent years.

Held, it could be given a set-off.

Principles (at page 637) :

1. *Whether two or more lines of business may be regarded as the "same business" or "different businesses" depends not upon the special methods prescribed by the Income-tax Act for computation of the taxable income, but upon the nature of the businesses, the nature of their organisation, management, source of the capital fund utilised, method of book-keeping and a host of other related circumstances which stamp them as the same or distinct.*

2 *If one business cannot conveniently be carried on after the closure of the other, there would be a strong indication that the two businesses constitute "the same business", but no decisive inference may be drawn from the fact that after the closure of one business another may conveniently be carried on.*

Case No. 103

Sale

Immovable Property Sale must be by Sale Deed—Mere Agreement is not enough.

In C. I. T. v. Bhurangya Coal Co., Ref. 34 I. T. R., page 802.

Facts :— On 16th. March, 1946, there was an agreement to sell immovable properties and movable properties belonging to the assessee to a limited company which was incorporated on 18th. march, 1946. Agreement of the 16th. March, 1946, was signed by two Directors of the Company and the Directors after incorporation confirmed this agreement. The delivery of movable properties was made on 29th. March, 1946, including fixtures. For immovable properties sale agreement was made on 17th. May, 1946.

Question was whether delivery of possession and agreement of 16th. March, 1946, would be sufficient in the eye of law so as to enable the Revenue authorities to hold that sale of immovable properties also took place before 31st March, 1946. Capital gains-tax came into force on 1st. April 1946,

Held, that immovable properties could not have been sold

without a registered deed which was executed in May, 1946, and therefore, capital gains tax was attracted on sale of immovable properties only. Movable properties, fixtures and fittings, were sold prior to 31st. March, 1946 by delivery and no question of registration of the sale deed arose. Case was remanded to the Tribunal on the ground-what are immovables and what are movables ?

Case No. 104**Sale or exchange**

A Document Evidencing Exchange-If in the form of the Sale Deed Whether can lead to another inference - How to interpret Document.

In C. I. T. Andhra Pradesh v. Motors & General Stores (P.) Ltd , Ref 66 I. T. R., page 692.

Whether a document is a sale-deed or is only an exchange will depend upon to the interpretation of the language itself used in the document. In this case transfer of cinema house for exchange of preference share was held to be not a sale.

The distinction between 'sale' and 'exchange' has been explained by the Supreme Court thus :

Principle (at page 696) :

It is clear therefore that both under the Sale of Goods Act and the Transfer of Property Act, sale is a transfer of property in the goods or of the ownership in immovable property for money consideration. But in exchange there is a reciprocal transfer of interest in the immovable property, the corresponding transfer of interest in the movable property being denoted by the word "barter". The difference between a sale and an exchange is this, that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter

Case No. 105**Sale of Shares**

Acquiring of Managing Agency-Yet Evidence was such that Sale of Shares resulted in Taxable Income.

In Rajputana Textiles (Agencies) Ltd. v. C. I. T., Bombay City, Ref. 42 I. T. R., page 743.

Facts :— 'S' were managing agents and held 19,76,000 shares of the managed company. The promoters entered into an agreement with 'S' to take over managing agency and whole block of shares. Price of managing agency was Rs. 12½ lakhs. Price of whole block was Rs. 83 lakhs. Promoters made an agreement with the assessee-company for taking over the managing agency from 'S'. Before the actual transfer took place the promoters through dalals and brokers made transaction of sale of 2/3 of the shares block which they had agreed to purchase from 'S'. On such sale in the market, they made profits of Rs. 6 lakhs an odd. Question was whether this is income or capital accretion.

Held, that because surrounding circumstances and the evidence of sale of 13 lakhs shares through the brokers in the market. It could be held, that the profit resulting from such sale was purely a commercial profit. That it could not be exempt on the ground that it was a isolated transaction or transaction of capital acquisition.

Note :— Though law is that managing agency acquisition is a capital asset but in the present case the evidence of sale, the employment of brokers and releasing 13 lakhs shares in the market and retaining only 6 lakhs for holding the managing agency coupled with the action of the promoters before the agreement with the assessee-company became effective lead to the inference that the evidence was sufficient to hold that it was a commercial transaction and not a transaction of capital relating to acquiring of managing agency.

Case No. 106

Valuation

Engineers Certificate cannot be unreliable unless there is other Material to disturb his figures.

In C. I. T., Madras v. Ajax Products Ltd. Ref. 55 I. T. R., page 741.

Facts :— It was found that liquidator of a company sold assets in liquidation proceedings to another company for value which was fixed and ascertained by the expert's opinion. Value certificate was issued accordingly by the engineers and relied upon. The value of the assets by the transferee company was shown at the figure mentioned in the certificate. The Income Tax Officer disturbed the

value on the ground that it was not consistent with the market conditions. Also Income Tax Officer held, that it was inflated and transferee company would get advantage in claiming higher depreciation. The Appellate Assistant Commissioner restored the values which were fixed by the liquidator on sale. The Appellate Tribunal in appeal disturbed the valuation figures which were given in the engineer's certificate.

The question before the Supreme Court was whether the engineer's certificate could be interfered with and whether there was material before the Tribunal to fix value by their own opinion.

Held, the Tribunals interference was uncalled for. Commissioner's appeal before the Supreme Court was dismissed.

Principles (at page 745) :

1. *There is nothing on the record to disclose that the valuation certificate was issued in connection with the floatation of the company; nor is there any material to suggest that any particular building was omitted from the estimate and that those omitted had any marketable value at all. What is more, the estimate of the value given by the Tribunal was a pure guess unrelated to the material placed before it.*

2. the High Court was certainly entitled to go behind the finding of the Tribunal and substitute the figures adopted by the Appellate Assistant Commissioner.

The subject is not to be taxed unless the charging provision clearly imposes the obligation.

If the words of a statute are precise and unambiguous they must be accepted as declaring the express intention of the legislature.

A proviso must be considered harmoniously with the main enactment.

Fictions should not be stretched beyond the purposes for which they were enacted.

Before the chapter is closed, attention is again invited to, whether the explanation or the evidence is convincing, will very much depend upon the probabilities of the case, human conduct and surrounding circumstances with reference to item in dispute. Judgment should be that of an ordinary prudent person. *See: Homi Zehangir Gheesta v. C. I. T., Bombay City, Ref. 41 I. T. R., page 135.*

6

Post & Agency

The problem as to the place where the income is received is not free from difficulty. Sometimes the posting of the cheque is the criteria of the place where the income is received and sometimes the place where the cheque is received by the supplier of the goods. On evidence and in the surrounding circumstances viz. instructions and the conduct etc.. It should be determined as a matter of fact whether post was the agent of the supplier of goods or the person issuing the cheque. Following judgments will clinch the issue :

Case No. 107

First is the case of *C. I. T., Bombay South, Bombay v. Ogale Glass Works Ltd.*, Ref. 25 I. T. R., page 529.

Facts :— The assessee was a manufacturer of articles in an Indian state. It supplied the goods to the Government of India and under the agreement agreed to receive cheques drawn by the Government of India, on Imperial Bank or on Reserve Bank, or on any other Bank in British India. The cheques when received in an Indian State by the assessee were given to the Bank for encashment. When the cheque amount was received in an Indian State; receipt was issued by the assessee in favour of the Government of the amount having been received. Revenue authorities raised additional grounds that under the implied agreement posting of cheque in Delhi amounted to receipt of income in Delhi. The argument before the Supreme Court was on behalf of the assessee that on the day the cheque was received in an Indian State; assessee gave credit to the Government

by passing entry and thus income was received in an Indian State. The stand of the Government was that when the post office was the agent of the non-resident under the implied contract the posting of the cheques in British India amounted to receipt of income in British India.

Held, that under the implied agreement, the post office became the agent of the assessee. Posting of cheque in Delhi amounted to receipt of income in Delhi. The assessee was liable to be assessed on income received in British India though he was a non-resident assessee.

Principle (at page 546) :

Apart from the implication of an agreement arising from such business usage the assessee expressly requested the Government to "remit" the amounts of the bills by cheques. This, on the authorities cited above, clearly amounted in effect to an express request by the assessee to send the cheques by post. The Government did act according to such request and posted the cheques in Delhi. It can scarcely be suggested with any semblance of reasonable plausibility that cheques drawn in Delhi and actually received by post in Aundh would in the normal course of business be posted in some place outside British India. This posting in Delhi, in law, amounted to payment in Delhi.

Case No. 108

The second case is *C. I. T., Bombay South, Bombay v. Kirloskar Bros. Ltd.*, Ref. 25 I. T. R., page 547.

Facts :—In this case, facts found were similar to those found in '*Commissioner of Income-tax, Bombay South, Bombay v. Ogale Glass Works Ltd.*, Ref. 25 I. T. R., page 529,' except in the following particulars :—

"(1) All cheques were made non-negotiable; (2) no credit was given by the Bank to the assessee before collection; (3) there was no finding that the assessee gave credit to the Government for the amount of the cheque immediately on receipt thereof."

Held, that on the facts of the case, income, profits and gains in respect of sales made to the Government of India were received in British India within the meaning of Section 4 (I) (a) of the Indian Income-tax Act, 1922.

Case No. 109

The third case is *Shri Jagdish Mills Ltd. v. C. I. T., Bombay*, Ref. 37 I. T. R., page 114.

Facts :—(Facts of this case are also similar to *Ogale Glass Works Ltd.*) The goods were supplied from Baroda (Indian State) by the company incorporated there to Government of India, bills were submitted to the Government of India for payment through cheque. The bills were submitted in prescribed form to the Government to make payment by drawing cheque and sending it by post to the non-resident assessee company from Reserve Bank or Imperial Bank. Non-resident company endorsed them to collect the money at Ahmedabad or Bombay. It accepted the cheque in full and final payment of the bill. The Tribunal found, that there was an implied agreement and consent of the non-resident to send the cheque by post. Thus, post became an agent of non-resident. Place of receipt was found to be India and income was taxable.

Held, that looking to the nature of transactions, it was a proper inference drawn by the Tribunal that there was a implied agreement to send the cheque by post. Post office was thus the agent of the non-resident company. Place of receipt of income was British India

Case No. 110

The fourth case is *C. I. T., Madhya Pradesh & Bhopal v. Bhopal Textiles Ltd.*, Ref. 41 I. T. R., page 72.

Facts :—The assessee, a non-resident company in Bhopal, supplied goods to the Government of India or its nominees at Agra, Allahabad and Delhi (all places in British India). In pursuance of an agreement, the goods were to be sent F. O. R. Bhopal. That the prices were also to be paid there. The goods were all despatched through rail F. O. R. Bhopal. The railway freight and other charges were to be borne by the consignees. The railway receipt was taken out in the name of the consignee and was forwarded to the Bhopal branch of the Imperial Bank of India with a request to the Bank to deliver the railway receipt and the bill to the consignee against payment of the bill amount and collection charges. The Bhopal branch sent the receipt to the branch of the Bank at Agra,

Allahabad or Delhi, which collected the amounts due and transmitted them to the Bhopal branch to the credit of the assessee. The Appellate Tribunal held, that the amounts so realised were received in British India and were, therefore, liable to Income-tax under Section 4 (1) (a) of the Income-tax Act of 1922. The High Court, on a reference, came to the conclusion that the property in the goods passed to the buyers at Bhopal and that the amounts were not received and could not be deemed to have been received in British India.

Held, that as the assessee had handed over the receipts to the Bank and asked the Bank not to deliver the railway receipts to the buyers unless payment was received, the document of title to the goods remained the property of the assessee until payment for it was received and it was handed over. The Bank was the agent of the seller, the assessee, and the place where the agent was paid, was the place where the assessee could be said to have received the amounts. The income must, therefore, be deemed to have been received by the assessee at Agra, Allahabad or Delhi in British India and the assessee was liable to tax in respect thereto under section 4 (1) (a).

Principle (at page 75) :

A railway receipt is a document of title to goods, and, for all purposes represents the goods. When the railway receipt is handed over to the consignee on payment, the property in the goods is transferred.

Case No. 111

The fifth case is *C.I.T., Bihar & Orissa v. Patney & Co., Ref. 36 I. T. R., page 488.*

Facts :— The respondents, who were non-residents carrying on business at Secunderabad in the territories of the Nizam of Hyderabad outside British India, acted as agents for two companies resident in British India for the supply of certain goods to the Nizam's Government. The respondents received cheques drawn on Banks in British India towards commission from the resident companies. The cheques were sent by post from places in British India and were received by the respondents at Secunderabad, credited in the respondents' account books and sent to their bankers for collecting

and crediting to their account.

The question was whether the amounts of commission received by the respondents by cheques were received in British India. The respondents, in support of their contention that the moneys were received in Secunderabad outside British India, filed an affidavit stating that it was verbally agreed that the commission would be paid at Secunderabad in cash or by cheque, as the case may be :

Held, that, 'as the respondents had expressly required the commission to be paid at Secunderabad outside British India, the rule in '*Ogale Glass Works case*' did not apply and the moneys were not received by the respondents in British India.

P rinciple (at page 491) :

In the case of payment by cheques sent by post the determination of the place of payment would depend upon the agreement between the parties or the course of conduct of the parties. If it is shown that the creditor authorised the debtor either expressly or impliedly to send a cheque by post the property in the cheque passes to the creditor as soon as it is posted. Therefore, the post office is an agent of the person to whom the cheque is posted if there be an express or implied authority to send it by post.

Case No. 112

The sixth case is *C. I. T., Delhi v. P. M. Rathod & Co., Ref. 37 I. T. R., page 145.*

Facts :— Assessee's contention was that the place of receipt of income was Part "B" State where it manufactured the articles and delivered goods to people residing in Part "A" & "C" States. Modus-operendi of sale was as follows :

1. "That in the case of goods sent by the V.P.P. Function, of the post office was of the agent of the respondents for the recovery of the price of the goods, and as the goods passed at the place where the price was paid; the price was received by the respondents in the Part "A" or Part "C" State.

2. That in the case of goods sent by rail, as the railway receipts made in favour of self could not be delivered to the buyer till the money was paid and although the goods had been handed

over to a common carrier the appropriation to the contract was only conditional and the performance was completed only when the monies were paid and the railway receipts delivered, these contracts also must be taken to have been performed in the Part "A" or Part "C" State and the price paid to the Bank as agent of the respondents at the place of demand and delivery of the receipts; the income was therefore, received by the respondents in the Part "A" or Part "C" State."

Held, that in both the types of sales income was received in Part "A" & "C" States and not in Part "B" State where the articles were manufactured by the assessee and so the contention of the assessee failed.

Note :— In '*C. I. T., Bombay South, Bombay v. Ogale Glass Works Ltd., Ref. 25 I. T. R., page 529,*' new line of argument was advanced by the Revenue authorities before the Supreme Court that post office was the agent of the non-resident company. The controversy whether it was a new point or a new line is dealt in *Chapter XIII*. In respect of this case Supreme Court permitted the new line of argument on the view that it was not a new point but covered by the broad question of law.

NOTE

The importance of the above cases is only with reference to the receipt of income and the place where such income is received. The importance of place is very little after the merger of the states in Indian Union. Yet a place of receipt of income will always play an important role in progressive countries and in inter state transaction.



7

Appellate Tribunal's Duty & Power

The Income-tax Appellate Tribunal is the second appellate court under the Income-tax Act and it is the final fact finding authority. Against its judgment only reference on question of law lies in the High Court. Though it is not a court in the technical sense but the functions of the Appellate Tribunals are judicial. It must act judicially and give judgments on all the evidence brought on the record whether by the assessee or by the Revenue authorities. In this background, decisions of the Supreme Court are placed in this chapter :

Case No. 113

Affidavit

If not considered by the Appellate Tribunal Legal Position.

In C. I. T., Bombay City-1 v. Greaves Cotton & Co. Ltd., Ref. 68 I. T. R., page 200.

Facts :— That 18 lacs compensation was paid by the respondent to its managing agents on their pre-mature termination of the managing agency. The amount was claimed as a deduction but disallowed by the Revenue authorities. The case came before the Supreme Court and on behalf of the respondent, who were the assesseees in this case, arguments were advanced by Mr. Kolah that some of the relevant evidence in the form of the affidavit and otherwise

placed before the Tribunal were not duly considered. Observing that High Court has no power to sit in an appraisal of the evidence afresh and that such questions are of mixed law and facts; Supreme Court had to set aside the judgment of the Appellate Tribunal for re-hearing of the appeal by making the following :

Observation (at page 208-09) :

Mr. Kolah then stressed the argument that the order of the Appellate Tribunal itself is defective in law because there is no clear finding recorded by the Appellate Tribunal that the termination of the managing agency agreement was not bona fide or made with an ulterior or oblique motive. It was pointed out that the Appellate Tribunal has not considered the relevant evidence in deciding the question whether the termination of the managing agency agreement was bona fide and was in the interest of commercial expediency. It was stated, in the first place, that the managing agency was a valuable asset acquired by payment of Rs. 27 lakhs by the managing agents to Messrs. Greaves Cotton & Co.. It was also pointed out that the remuneration payable under the 1950 agreement was much less than that provided in the 1947 agreement and if such an agreement was to be terminated, reasonable compensation had to be paid to the managing agents. It was urged that the respondent-company wanted to manage its affairs by its board of directors and for that purpose they bona fide desired to terminate the managing agency agreement. No collusion was alleged between the respondent-company and the managing agents. The respondent-company has not acted in a secret way but an independent sub-committee was appointed to go into the question. It was not shown that after the management was taken over by the board of directors the affairs of the respondent-company had suffered. On the other hand, it was positively shown that the respondent-company had within seven years recouped to the extent of Rs. 16 lakhs out of Rs. 18 lakhs by saving the managing agency commission which would otherwise have been payable to the managing agents. Reference was also made to the affidavit of Mr. Parelwalla dated January 8, 1959, which was filed before the Appellate Tribunal. It was alleged that a statement was filed before the Appellate Assistant Commissioner disclosing that for the period of seven years upto March 31, 1958, there was a saving of Rs. 15, 78,753. Neither the Appellate Assistant Commissioner nor the Appellate Tribunal has taken any cognisance of the affidavit of Mr. Parelwalla or the statement of the annual savings

furnished by Mr. Parelwalla. In our view, there is considerable justification for the argument of Mr. Kolah and the order of the Appellate Tribunal is highly unsatisfactory as it has not taken into account all the relevant material adduced by the parties in the case on the question in controversy and the finding of the Appellate Tribunal is not clear and therefore defective in law.

Case No. 114

Association of Persons

Its Individual Members – Whether should be Assessed.

In C. I. T., U. P. v. Kanpur Coal Syndicate, Ref. 53 I. T. R., page 225.

Question was whether Tribunal can knock off the assessment of association of persons and direct the Income-tax Officer to make the assessment upon the individual members or amend the assessment of individual members. Appeal filed before the Tribunal was by association of persons.

Principle (at page 230) :

Under this section-33 (4) [Act of 1922]— the Appellate Tribunal has ample power to set aside the assessment made on the association of persons and direct the Income-tax Officer to assess the individuals or to direct the amendment of the assessment already made on the members.

Note :— Similar is the power of the Tribunal in deciding the appeal of the firm vis-a-vis the partners assessment.

Case No. 115

Comparable cases

Gross Profit Rates—Power of the Appellate Tribunal.

In C. I. T., Bangalore v. K. Y. Pilliah & Sons, Ref. 63 I. T. R., page 411.

Facts :— The assessee's gross profit rate shown was 6.5% which was low as compared to other comparable cases. The Income-tax Officer also discovered that there were some purchase vouchers missing and that there were certain sales made in the names of assessee's son and accountant and thus in his opinion there was suppression of sales to a tune of one lakh. Thus he made the assessment on a turnover at a figure of Rs. 12 lakhs and applied a higher gross rate

which was in his opinion fair and reasonable to the nature of the business of the assessee. Appellate Tribunal came to the conclusion that rejection of accounts and estimate of profit was reasonable.

Held, no interference in the judgment of the Tribunal was called for and it was a pure finding of fact.

Principle of law (at page 415) :

The Income-tax Appellate Tribunal is the final fact-finding authority and normally it should record its conclusion on every disputed question raised before it, setting out its reasons in support of its conclusion. But, in failing to record reasons, when the Appellate Tribunal fully agrees with the view expressed by the Appellate Assistant Commissioner and has no other ground to record in support of its conclusion, it does not act illegally or irregularly, merely because it does not repeat the grounds of the Appellate Assistant Commissioner on which the decision was given against the assessee or the department.

Case No. 116

Conjectures & Surmises

Conjectures and Surmises is no Evidence.

In Lalchand Bhagat Ambica Ram v. C. I. T., Bihar & Orissa, Ref. 37 I. T. R., page 288.

(For facts refer Case No. 81 & 19 *supra*)

Principle of law (at page 295) :

When a court of fact arrives at its decision by considering material which is irrelevant to the enquiry, or acts on material, partly relevant and partly irrelevant, where it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its decision, a question of law arises : whether the finding of the court of fact is not vitiated by reason of its having relied upon conjectures, surmises and suspicions not supported by any evidence on record or partly upon evidence and partly upon inadmissible material.

Case No. 117

Double Taxation

Cash Deposits included and Additional Profits on rejection of Accounts also added—Tribunal decision affect of.

In C. I. T., Madras v. S. Nelliappan, Ref. 66 I. T. R., page 722.

Facts :— That the assessee was plying buses on different routs. The account books were not accepted by the Income-tax Officer. After rejection, income was estimated by including certain cash deposits also as suppressed income. A A.C. dismissed the appeal. Appellate Tribunal also dismissed the appeal with the observation that the final computation of the profits made by the Income-tax Officer gave an average rate very much less than Rs. 4,000 per vehicle, and that the final assessments at rates less than the rates "uniformly followed in other bus and lorry cases could not be said to be excessive or unreasonable". The Tribunal declined to deal with the contentions raised in the appeal about the individual items since in their view those contentions had "a direct bearing on this final quantum" and the assessee had failed to discharge "the primary onus" on them "to show that the overall quantum is excessive". The Tribunal submitted a statement of the case under section 66 (2) of the Indian Income-tax Act to the High Court of Madras and referred the question whether the Tribunal was justified in estimating the income of the assessee and refusing to consider the contentions put forward by them.

The High Court remanded the case for rehearing to the Tribunal. The Tribunal observed thus, since in each of the two years under appeal additions to the book profits had been accepted in excess of the amounts of cash credits "additions of these credits had become redundant", and should be deleted and the assessing Officer should amend the assessments and adjust the tax liability. The Commissioner took the case to the Supreme Court.

Principle of law (at page 724) :

In hearing an appeal the Tribunal may give leave to the assessee to urge grounds not set forth in the memorandum of appeal, and in deciding the appeal the Tribunal is not restricted to the grounds set forth in the memorandum of appeal taken by leave of the Tribunal. The Tribunal was, therefore, competent to allow the assessee to raise the contention relating to the cash credits which was not made the subject-matter of a ground in the memorandum of appeal. It cannot be said that in accepting the contention of the assessee that the cash credits represented income from the business

withheld from the books, the Tribunal made out a new case inconsistent with the assessee's own plea. In any event the Tribunal is not precluded from adjusting the tax liability of the assessee in the light of its findings merely because the findings are inconsistent with the case pleaded by the assessee.

Case No. 118**Evidence**

That should be considered by the Tribunal.

In Omar Salay Mohamed Sait v. C. I. T., Madras, Ref. 37 I.T.R., page 151.

Facts :— That some explanation was given by the assessee regarding introduction of money in his business books which he said was out of the sale proceeds of gold and gold ornaments. Some vouchers from the jewellers were given and affidavits were also filed and lot of evidence placed in the penalty proceedings in connection with the same assessment year. In setting aside the judgment of the Tribunal the Supreme Court stated the duty of the Tribunal to examine all evidence. (See Case No. 79—Chapter 4 for Tribunal's duty in passing orders.)

Case No. 119**Firm's Genuineness**

Decision on Insufficient Materials.

In Krishna Flour Mills v. C. I. T., Bangalore, Ref. 44 I. T. R., page 501.

Facts :— That the firm consisting of husband, his wife and his brother-in-law was constituted under a Deed of Partner ship. Each contributed capital in the firm. The account books maintained were not found to be false. There was nothing to suggest that the firm was not genuine. The Appellate Tribunal came to the conclusion that genuineness of the firm was very much suspicious.

The Supreme Court took the view that judgment of the Appellate Tribunal was based upon no evidence and, therefore, a question of law arisen out of the judgment.

Principle of law (at page 505) :

Apart from the relation between the parties which is not in dispute,

the Tribunal has not really referred to any conduct of the parties inter se which would indicate that the partnership was not genuine. The underlying assumption in the reasoning of the Tribunal seems to be that a partnership consisting of the wife and brother-in-law must be necessarily suspect and if the wife saves her profits and the brother-in-law does not spend his share of the profits fully, the inference must be that the partnership is a bogus partnership.

Case No. 120

Issue

It is not raised before the Tribunal.

In Kusumben D. Mahadevia v. C. I. T., Bombay-City, Ref. 39 I. T. R., page 540.

Held, that where an issue was not raised before the Income-tax Appellate Tribunal and there was no opinion expressed by the Tribunal that issue cannot be reframed by the High Court in its advisory jurisdiction and decided. Such an action of the High Court is beyond its jurisdiction. (Case discussed *infra* Chapter-12 "High Court's Jurisdiction").

Case No. 121

Judicial Function

Judicial Function of the Tribunal.

In Esthuri Aswathiah v. C. I. T., Mysore, Ref. 66 I. T. R., page 478.

Facts :— Shortly facts show that on 1st. July, 1949, assessee introduced in his business books Rs. 1,87,000/- as opening cash balance. His plea was that it is out of his agricultural income, assets received by him on partition and his bank balance in 1946, with which he was possessed in that year. The Income-tax Officer treated Rs. 50,000/- as available at home but added Rs. 1,37,000/- as income from undisclosed sources in the assessment year 1951-52. The Appellate Assistant Commissioner knocked off this addition on the ground that if at all it could be treated as income it should be for the financial year 1949-50 i. e. assessment year 1950-51. Accordingly for the year 1950-51 cases were re-opened and amount were brought to tax. Before the Appellate Assistant Commissioner appeal was dismissed. Before the Income-tax Appellate Tribunal this amount

of Rs. 1,37,000/- in the assessment year 1950-51 was reduced to Rs. 50,000/- only by recording the following order :

“It is clear that the assessee has not been able to explain the source of Rs. 1,37,000/- satisfactorily. But there have been trading additions for the assessment years 1951-52 and 1952-53 of Rs.27,899 and Rs. 85,000. But the assessee has not proved that this amount was all intact and besides, as pointed out by the departmental representative, the bank balance on 22nd October, 1946, would not have represented the cash possessed by the assessee and at the same time, it is not unlikely that the assessee had some cash having regard to the trade in jaggery, the assets got on partition in the Hindu undivided family and other sources; the counsel for the assessee also stated that his client was prepared to be assessed on Rs. 50,000. So we direct that the addition must be confined to Rs. 50,000 only.”

Question was this is an order judicial or based upon conjectures and surmises, answer is given by the High Court in the following terms :

Principle (at page 481-82) :

The function of the Tribunal in hearing an appeal is purely judicial. It is under a duty to decide all questions of fact and law raised in the appeal before it : for that purpose it must consider whether on the materials relied upon by the assessee his plea is made out. Conclusive proof of the claim is not predicated : the Tribunal may act upon probabilities, and presumptions may supply gaps in the evidence which may not, on account of delay or the nature of the transactions or for other reasons, be supplied from independent sources. But the Tribunal cannot make arbitrary decisions : it cannot found its judgment on conjectures, surmises or speculation. Between the claims of the public revenue and of the taxpayers, the Tribunal must maintain a judicial balance. The order passed by the Tribunal without recording any reasons in support of the estimate of unaccounted income cannot, therefore, be sustained.

Note :— The Supreme Court has affirmed the view of the High Court and remanded the case to the Income-tax Appellate Tribunal to re-hear the appeal in the light of the observations of the High Court and give opportunity and decide the case on evidence.

Case No. 122

Judicial Function

Judicial Function of the Tribunal and its Powers.

In Commissioner of Income-tax, Bombay v. Walchand & Co. Private Ltd., Ref. 65 I. T. R., page 381.

Facts :— The assessee company was the managing agents of nine other public limited companies. It was paying Rs. 2,500/- per month salary to each of the three Directors to look after the affairs of the company. There were three Executive Officers who were also well remunerated. There was increase of the Directors salary by Rs.1,000/- per month and that of the Executive Officer by Rs.500/- per month. After one year again there was a increase in the Directors' salary by Rs. 750/- per month and Executive Officers salary by Rs. 250/- per month. The Income-tax Officer did not allow the increase in the salary as a business expenditure. His view was that there was no increase in the income of the company so the increase in the remuneration was unjustified. The Appellate Assistant Commissioner confirmed the assessment. Appellate Tribunal modified the assessment without assigning any reasons and allowed the increments in part as business expenditure.

Question when came before the High Court Tribunals' judgment was over-ruled. Full increment given to the employees was treated as a business expenditure.

Supreme Court agreed with the decision of High Court. It has defined Tribunal's power in the following terms:

Principles (at page 384) :

1. *It is necessary to emphasize that, though the Tribunal is not a court, it is invested with judicial power to be exercised in manner similar to the exercise of power of an appellate court acting under the Code of Civil Procedure. Authority to "pass such orders thereon as it thinks fit" in section 33 (4) of the Income-tax Act, 1922, is not arbitrary : the expression is intended to define the jurisdiction of the Tribunal to deal with and determine questions which arise out of the subject-matter of the appeal in the light of the evidence, and consistently with the justice of the case.*

2. *In the hierarchy of authorities the Appellate Tribunal is the final fact-finding body : its decisions on questions of fact are not liable*

to be questioned before the High Court. The nature of the jurisdiction predicates that the Tribunal will approach and decide the case in a judicial spirit and for that purpose it must indicate the disputed questions before it with evidence pro and con and record its reasons in support of the decision. The practice of recording a decision without reasons in support cannot but be severely deprecated.

(at page 384-85) :

3. It is open to the Tribunal to come to a conclusion either that the alleged payment is not real or that it is not incurred by the assessee in the character of a trader or that it is not laid out wholly and exclusively for the purpose of the business of the assessee and to disallow it. But it is not the function of the Tribunal to determine the remuneration which in their view should be paid to an employee of the assessee.

(at page 385) :

4. In applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue.

5. The rule that increased remuneration can only be justified if there be corresponding increase in the profits of the employer is, in our judgment, erroneous.

Case No. 123

Judicial Function

Power to determine market value.

In Killick Nixon & Co. v. C.I.T., Bombay City-1, Ref. 66 I.T.R., page 714.

Facts :— In the computation of capital gains arising out of the transfer of its capital assets, the assessee had exercised its option to adopt the fair market value of the assets as on January 1, 1939, for the computation of their actual cost and had produced evidence. The Appellate Assistant Commissioner estimated the value of the assets on January 1, 1939, at a certain figure. The assessee appealed to the Appellate Tribunal contending that the evidence on record showed that the fair market value of the assets on January 1, 1939, exceeded that estimate of A. A. C. . The Tribunal did not consider the evidence but merely recorded that the value of the assets could not

exceed the amount at which it was estimated by the Appellate Assistant Commissioner.

Held, Supreme Court disagreed with the Tribunal judgment because it was a summary disposal of the issue without proper reasoning. The guiding principles for the Tribunal have already been stated : See *Case No. 55* -Chapter 2.

Case No. 124

Jurisdiction & Power

New plea raised.

In C. I. T., Madras v. Mahalakshmi Textile Mills Ltd , Ref. 66 I. T. R., page 710.

Facts :— Shortly facts show that the assessee had claimed deduction on account of new installation as if he was entitled to development rebate depreciation etc. . Before the Tribunal a new plea was raised that factual circumstances, if examined, would permit him to have allowance on account of current repairs. Tribunal entertained the new plea and allowed the expenditure as current repairs.

Question arose whether a new plea can be raised by the assessee in the Tribunal which he did not raise earlier and whether Tribunal had powers to entertain a new ground and can allow relief on that new point.

Held, that it could grant relief or deduction under one or other provisions of the act and there were no restriction imposed on the Tribunal powers under the Act for entertaining new grounds.

Principle (at page 712-13) :

By the first question the jurisdiction of the Tribunal to allow a plea inconsistent with the plea raised before the departmental authorities is canvassed. Under sub-section (4) of section 33 of the Indian Income-tax Act, 1922, the Appellate Tribunal is competent to pass such orders on the appeal "as it thinks fit". There is nothing in the Income-tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal. If for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and

the Tribunal, and indeed they would be under a duty, to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him.

Case No. 125**Jurisdiction and Resjudicata**

In Income-tax Officer, A-Ward, Sitapur v. Murlidhar Bhagwan Das, Ref. 52 I. T. R., page 335.

Facts :— That for the assessment year 1949-50 originally the Income-tax Officer framed the assessment under section 23 (4) of the Income-tax Act 1922 i. e. best judgment assessment. It was subsequently cancelled under section 27 on the ground that there was reasonable cause for failure to comply with the notice. Assessment for the year 1949-50 was made afresh in which sum of Rs. 88,737/- was included being interest on U. P. Encumbered Estates Act Bonds. This amount was challenged in appeal and the Appellate Assistant Commissioner deleted the amount on the ground that it was a receipt in the year relevant for assessment year 1948-49 and directed that it should be included in the back assessment year.

Question was whether the direction of the Appellate Assistant Commissioner could give jurisdiction to the Income-tax Officer and enable him to re-open the case for the year 1948-49 which was otherwise time-barred.

Held, that direction of the Appellate court could only be confined to that year for which he was hearing the appeal. Re-opening of the back year under these directions was invalid.

Principles of law (at page 343) :

1. It is important to remember that the proviso does not confer any fresh power upon the Income-tax Officer to make assessments in respect of escaped incomes without any time-limit. It only lifts the ban of limitation in respect of certain assessments made under certain provisions of the Act and the lifting of the ban cannot be so construed as to increase the jurisdiction of the Tribunals under the relevant section. The lifting of the ban was only to give effect to the orders that may be made by the appellate, revisional or reviewing Tribunal within the scope of its jurisdiction.

(at page 345) :

2. Therefore, the expression "finding" as well as the expression "direction" can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein. The words "in consequence of or to give effect to" do not create any difficulty, for they have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso. If the scope is limited as aforesaid, the said words also must be related to the scope of the findings and directions.

Note :— Appellate Tribunal's powers are not higher than the assessing officer so far as the jurisdiction over the assessment is concerned.

Case No. 126

Miscellaneous Application

Wrongly Entertained by the Tribunal.

In C. I. T., Madras v. MTT. AR. S. AR. Arunachalam Chettiar, Ref. 23 I. T. R., page 180.

Facts :— Somewhat lengthy facts indicate that assessee had income at Singapore, Kuala Lumpur and Maubin. The Income-tax Officer in the assessment included the foreign income and brought to tax without granting certain relief to him under different heads and also in refusing the expenditure incurred under the head plantation and also refusing the bad debts. Against this assessment there was an appeal before the Appellate Assistant Commissioner which resulted in some modification of the income. There was a second appeal before the Income-tax Appellate Tribunal. Appeal was partly allowed and when it came back to the Income-tax Officer; he recomputed the income. In recomputation of the income the Income-tax Officer put in his ingenuity and brought to charge Rs. 13,541/- as income being remittance of foreign income not assessed to tax in the preceding year. No fresh demand notice was issued by him. Against this item of Rs. 13,541/- there was an appeal before the Appellate Assistant Commissioner but not entertained.

There was a miscellaneous application moved to the Tribunal to delate this amount of Rs. 13,541/-. The Tribunal directed that

this amount should be deleted from the assessment. The Commissioner went to the High Court on the ground that Tribunal had exceeded its powers in entertaining miscellaneous application and in allowing the item because they were not sitting in appeal.

Held, no reference lay.

Principle of law (at page 189) :

An order thus founded on an error as to his jurisdiction may conceivably be corrected by appropriate proceedings but it cannot certainly be regarded as such an order as is contemplated by any of the sub-sections of Section 31. Such an order not coming within the purview of Section 28 or Section 31, no appeal lay therefrom to the Appellate Tribunal under Section 33 (1) and if no such appeal properly came before the Appellate Tribunal it could not properly make an order under Section 33 (4) and if there was no order under Section 33 (4) there could be no reference under Section 66, sub-section (1) or sub-section (2). It follows, therefore, that the order of the Appellate Tribunal correcting the order of the Income-tax Officer directing that the sum of Rs. 13,541/- should not be included in the assessment cannot be regarded as an order passed by the Appellate Tribunal under Section 33 (4) so as to attract the operation of Section 66.

Case No. 127

Relevant Circumstances

Relevant Material in totality should be examined.

In Commissioner of Income-tax, Punjab v. Indian Woollen Textiles Ltd., Ref. 51 I. T. R., page 291.

Facts :— The assessee had a branch named "Eldee". Rs.3 lacs was advanced by the assessee to "Eldee". "Eldee" in its turn advanced Rs. 3 lacs to Castle Mills of Bombay. The assessee company claimed that it is entitled to treat the money invested in Castle Mills as its own capital employed for the purpose of Section 15C; the money advanced to "Eldee" is money invested in a new industrial undertaking. The Appellate Assistant Commissioner rejected the contention. The reasons advanced by the Appellate Assistant Commissioner was that there were in these two undertakings the same 8 partners with a share of 2 annas each and that the constitution of both the undertakings being the same Castle could not be regarded as coming from separate entity. The Tribunal disagreed with

the view of the Appellate Assistant Commissioner relying upon only one circumstance that is in the assessment for the year 1951-52 the income from Castle was neither computed nor included in the assessment of the assessee.

Question came before the Supreme Court whether Tribunal's decision was correct in law.

Held, it was not correct.

Principle (at page 294) :

The conclusion of the Tribunal, therefore, suffers from a double infirmity: it assumes the only fact on which its conclusion is founded and ignores other relevant matters on which the Appellate Assistant Commissioner relied in support of his conclusion. The Tribunal has therefore misdirected itself in law in arriving at its finding, and in refusing to require the Tribunal to state the case and to refer it, the High Court was, in our view, in error.

Case No. 128

Stay Application

Appellate Tribunal's Powers to stay-Tax recovery in appropriate Cases.

In Income-tax Officer, Cannanore v. M. K. Mohammed Kunhi, Ref. 71 I. T. R., page 815.

Facts :— That penalties of Rs. 18,000/-, Rs. 1,700/- and Rs. 14,000/- were imposed for three assessment years. The penalty was imposed under section 271 (1) (c) of the Income-tax Act of 1961 for concealment of profits. The assessee had filed an appeal before the Appellate Tribunal and filed a separate application to grant stay of the recovery till the disposal of the appeals. Appellate Tribunal held, that it had no power to interfere with the tax collection. The assessee moved a writ under article 226 of the Constitution in the High Court. It was held in the writ petition that Appellate Tribunal had power incidental to its appellate jurisdiction to dispose off stay application according to law. Its refusal was not justified. Accordingly Appellate Tribunal was directed to consider stay application on merits. Then the appeals came before the Supreme Court from the High Court's judgment. The High Court's judgment was confirmed.

Principle of law (at page 822) :

It could well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.

A certain apprehension may legitimately arise in the minds of the authorities administering the Act that, if the Appellate Tribunal proceed to stay recovery of taxes or penalties payable by or imposed on the assessee as a matter of course, the revenue will be put to great loss because of the inordinate delay in the disposal of appeals by the Appellate Tribunal. It is needless to point out that the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the Tribunal will consider whether to stay the recovery proceedings and on that conditions, and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal.

Case No. 129**Tribunal Power-New Contention****Permission to produce Affidavits & Evidence**

In Moti Ram v. G. I. T., Ref. 34 I. T. R., page 646.

Facts :— The assessee was carrying on business in Srinagar (Kashmir). It made purchases from Amritsar and it was found by the Income Tax Officer that while making purchases at Amritsar, he remitted money from Srinagar to the tune of Rs. 3,00,000/- odd which was in his opinion from out of the past profits and therefore taxable on the basis of remittance. A.A.C. thought that only Rs. 1,20,000/- was from out of the past profits and so this amount was taxable. When the appeal came before the Appellate Tribunal the case was remanded for the fresh opportunity to be given to the assessee. The I. T. O. submitted the report that because of certain admissions by the assessee it could not be found what amount was circulating capital and what amount was past profits. Before the Tribunal fresh

arguments were advanced that the case was not that of remittance but was transmission of money through post from Srinagar on account of purchases made from the sellers. Therefore, it was not his income when it reached Amritsar in British India. So the question of remittance of profits does not arise. The Tribunal held that fresh and new line of argument would require fresh investigation into facts which they did not permit. On the old line of argument and relying on the I. T. O.'s report it held that the A. A. C. was correct in making the assessment on the basis of remittance. The case was not referred to the High Court. There was no submission made under section 66 (2). Direct appeal was lodged in the Supreme Court from the Tribunal's judgment with a prayer that recoveries may be stayed.

Supreme Court dismissed the appeal on the ground that the Tribunal was right in refusing to entertain new arguments on following :

Principles (at page 648) :

1. *The Tribunal then took up the case again on the basis of this report. It held that having admitted that the profits in Srinagar were mixed up with the working funds, the appellant had failed to show that the remittances to British India had not been out of the profits and that, therefore, the burden which lay on the appellant of rebutting the presumption that remittances were made out of profits had not been discharged.*

(at page 649) :

2. *We are clear in our mind that the Tribunal was right in holding that the question raised by the appellant could not be decided without taking further evidence.*

Case No. 129-A

Tribunal Power-New Contention

Jurisdiction of Tribunal to allow Department to raise New Grounds and remand matter to I. T. O. for Enquiry & Action.

In Hukumchand Mills Ltd. v. C. I. T., Central Bombay, Ref. 63 I. T. R., page 232.

Facts :— That the assessee, a company incorporated in the Native State of Indore, was assessed in British India (except for the assessment year 1948--49) as a non-resident on such income as fell within section 4 (1) (a) or (c) read with section 42 of the Indian

Income-tax Act, 1922. After the Constitution of India came into force, Indore became the Part B State and the Income-tax Act, 1922, was enforced in Part B States from April 1, 1950. From the assessment year 1950—51, the assessee became assessable as a resident. For the assessment years 1950—51 and 1952—53, one of the questions that arose for determination was the proper written down value of its building, machinery, etc., for calculating the depreciation allowable under Section 10 (2) (vi) of the Act. The Tribunal held that only that part of the depreciation which was entered into the computation of the taxable income of the assessee for the assessment years prior to 1950—51 could be treated as depreciation actually allowed; but not the total depreciation which went into the computation of the total world income. The Tribunal, however, permitted the Department to raise the contention that the Income-tax Officer had not considered the provisions of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, and remanded the matter back to the Income-tax Officer to ascertain whether any depreciation was allowed under the Indore Industrial Tax Rules and, if he was of opinion that these Rules related to Income-tax or Super-tax or any law relating to tax on profits of business, to take into consideration such depreciation actually allowed under these Rules also for the purpose of computing the written down value. The assessee contended that the Tribunal should not have allowed the Department to raise the contention for the first time before it remanded the case :

Held, that the Appellate Tribunal had sufficient power under Section 33 (4) of the Income-tax Act to entertain the contention of the Department with regard to the application of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, and remand the case to the Income-tax Officer.

Principle (at page 238) :

We are accordingly of the opinion that the Tribunal had jurisdiction to entertain the argument of the department in this case and to direct the Income-tax Officer to find whether any depreciation was actually allowed under the Industrial Tax Rules and whether such depreciation should be taken into consideration for the purpose of computing the written down value.

Case No. 130

Tribunal's Power

The Tribunal's Power & Duty, is Judicial in disposing of an appeal—It must Act for the Year for which there is an Appeal before them.

In C. I. T., Kerala v. Manick & Sons case:

The Supreme Court reversed the decision of the Kerala High Court by explaining the nature of the power and the duty of the Appellate Tribunal. The duty is to dispose off the appeal before them according to law. It must act judicially and decide the case on the facts found by the lower court, evidence before them and the legal principles applicable. This power is confined to the assessment year only. They cannot travel under Section 33 (4) of the Income-tax Act, 1922, and give a direction for re-opening the case of the back year and include some other income. Where the assessee had given a undertaking before the Appellate Tribunal that he would submit voluntary Return for the back year and get himself assessed, the view of the Supreme Court is that this type of undertaking is to be ignored. The back year's assessment can only be made according to law and according to scheme of the Act. It can be re-opened under Section 34 and under Section 35 or under Section 33(A) by the Commissioner. But the Tribunal has no power to direct the re-opening of the back year case for making a fresh assessment on the same income which they are deleting it in appeal.

The Tribunal cannot act contrary to the scheme of the Act. The power under Section 33 (4) is wide but it is confined to the year of assessment.

In this case the Appellate Tribunal had taken into consideration the income of the assessee for the two years and broke it into two parts, and also included certain cash credits to be included as income from undisclosed sources; and reduced it by intangible additions and thereafter took a undertaking from the assessee that income which they are reducing would be assessed in the back year for which the assessee would submit a Return.

Held, that such an action of the Tribunal was without jurisdiction. The Tribunal's only power is to decide whether the cash credits represent the income of the back year then it should be deleted or that it was capital receipt then also it should be deleted

but otherwise reducing it by intangible additions without reasons is wholly unwarranted (See 71 I. T. R., *Short Notes* page 43).

Case No. 131**Tribunal's Power in Ex-party cases**

Appellate Tribunal's powers in Disposing of Appeals while Appellant is absent.

In C. I. T., Madras v. S. Chenniappa Mudaliar case :

It is found that Appellate Tribunal which was acting under Rule 24 of the Appellate Tribunal's Rules, 1946, as amended in 1948, dismissed the appeal in *lemina* because appellant was absent on the date of the hearing.

Held, that the Rule was ultra vires. It is the duty of the Appellate Tribunal in disposing of an appeal to decide it on merits, examine the issue under consideration and decide the same by regular judgment. The words 'disposed off' necessarily follows that it should be disposal of the issue in appeal and not the disposal of the appeal alone (See 71 I. T. R., *Short Notes* page 33).

NOTE

The law relating to appeals and Tribunal's Jurisdiction is substantially the same under one New Act of 1961. These principles and the law relating to it as laid down by the highest court of India should hold good even after the repeal of the old Act.

Question of Law & Fact

(ENGLISH GUIDING PRINCIPLES)

Some important English decisions were brought to the notice of the Supreme Court of India in '*Oriental Investment Co.Ltd. v. C.I.T., Bombay, Ref. 32 I. T. R., page 664*', and the passage which brings out these English principles occurs at page 669. In the speech of Hon'ble J. Kapur, it is stated thus :

Case No. 132

"In *Stanley v. Gramophone and Typewriter Ltd., Ref.5 Tax Cases 358* at page 374, the Master of the Rolls discussed this question as follows :

"It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open' to the Court to say whether the evidence justified what the Commissioners held":

(A) These observations were explained by Hamilton, J., in '*American Thread Co.v. Joyce, Ref. 6 Tax Cases. 1*,' as implying that by giving the material on which their finding was based the Commissioners were inviting the Court to determine whether on that material they could reasonably arrive at the conclusion on which they did arrive. The House of Lords on appeal categorically confirmed that the Courts had no jurisdiction over conclusions of fact except to see

whether there was evidence to justify them and that proper legal principles had been applied.

(B) Lord Clerk in '*Californian Copper Syndicate v. Harris*, Ref. 5 Tax Cases 159 at page 166,' has laid down the test in the following words :

The question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making.

(at page 670-74) :

(C) The Lord President in a '*Scottish case Cayzer, Irvine & Co. Ltd. v. Commissioners of Inland Revenue*, Ref. 24 Tax Cases 491 at page 501,' stated the grounds on which the Court can interfere with the finding of the Commissioner as follows :

I think we have jurisdiction to entertain the question at law, which is whether the majority of the Commissioners were warranted on the evidence in determining as they did. At the narrowest it is always open to this Court in a stated case to review a finding in fact on the ground that there is no evidence to support it.

(D) Lord Parker in '*Farmer v. Trustees of the Late William Cotton*, Ref. [1915] A. G. 922 at page 932,' after referring to the difficulty of distinguishing between a question of fact and a question of law observed :

Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only.

(E) But this statement of the law was considerably modified in '*Inland Revenue Commissioners v. Lysaght*, Ref. 13 Tax Cases 511,' where it was held that if the issue before the Court could be described as a "question of degree" the conclusion must be a question of fact.

(F) *Commissioners of Inland Revenue v. Korean Syndicate Ltd.*, Ref. 12 Tax Cases 181, was a case where a syndicate was registered for the purpose of acquiring and working concessions and turning them to account, and of investing and dealing with monies not immediately required. The syndicate acquired part of a right to a

concession in Korea and then under an agreement described as a "lease", in consideration of receiving sums of money termed "royalties" but which were really percentages of profits made by assignee company assigned the lease to a development company. Some moneys which were received from sale of certain shares obtained by the syndicate in exchange for shares originally acquired in the mining company were deposited in a bank. The activities of the company were during the relevant period confined to receiving the bank interest and royalties, distributing the amount amongst its shareholders as dividend. The question for decision was whether the syndicate was carrying on a business and was therefore liable to excess profits duty. From these facts it was concluded that they were carrying on a business.

Atkinson, L. J., pointed out *at page 204* that merely because a company is incorporated it does not necessarily follow that it is carrying on business. Its memorandum only shows that the company was incorporated for a particular purpose but taking into consideration the surrounding circumstances and facts of the case it was concluded that the company was carrying on a business.

(*at page 671-72*) :

(G) In *Great Western Railway Co. v. Bater*, Ref. 8 Tax Cases 231 *at page 244*, the question for decision was whether a clerk held a public office to fall within Schedule E. It was held that the determination by the Commissioners of questions of pure fact are not to be disturbed unless it should appear that there was no evidence before them upon which they, as reasonable men, could arrive at the conclusion which they came to. Lord Atkinson said :

What I have many times in this House protested against is the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact.

According to the dictum of Lord Wrenbury the question for the Court was whether on the facts found and stated by the Commissioners the clerk held the office within the meaning of the Act which was a question of law.

(H) In *Lysaght v. Commissioners of Inland Revenue*, Ref. 13 Tax Cases 511 *at page 533-34*, the question for decision was whether

assessee was a resident and ordinarily resident in United Kingdom in the year of assessment. Lord Buckmaster said :

The distinction between questions of fact and questions of law is difficult to define, It is, of course, true that if the circumstances found by the Commissioners in the special case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence, and their prolonged or repeated repetition would certainly produce that result then the matter must be a matter of degree; and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the Commissioners and it is not for the Courts to say whether they would have reached the same conclusion.

(I) *Jones v. Leeming*, Ref. [1930] A. C. 415, was a case where the respondent with three other persons obtained an option to purchase a rubber estate in the Malay Peninsula. That estate along with another was sold at a profit. The Commissioners found that the respondent had acquired the property with the sole object of turning it over again at a profit and at no time had he the intention of holding it. This transaction was held not to be in the nature of trade nor the profits arising therefrom in the nature of income but they were accretions to capital and, therefore, not subject to tax under Case VI of Schedule D

(J) *In Cameron v. Prendergast*, Ref. 8 I. T. R., Suppl. 75, the following test was laid down by Viscount Maugham:

Inferences from facts stated by the Commissioners are matters of law and can be questioned on appeal. The same remark is true as to the construction of documents. It the Commissioners state the evidence it is open to the Court to differ from such holding.

(K) *In Bomford v. Osborne*, Ref. 10 I.T.R., suppl. 27, a farm was working as a mixed farm but as a single unit. The question for decision was whether the assessment could be apportioned, one part being assessed as a farm and the other as a nursery. Viscount Simon laid down the test in the following words :

No doubt there are many cases in which Commissioners, having had proved or admitted before them a series of facts, may deduce therefrom

further conclusions which are themselves conclusions of pure fact. But in such cases the determination in point of law is that the facts proved or admitted provide evidence to support the Commissioners' conclusions.

It was also held that this question was a mixed question of law and fact.

(L) Du Parcq, J., in *J. H. Bean v. Doncaster Amalgamated Collieries Ltd.*, Ref. 2 All. E. R. 279 at page 284, held the following to be the test for determining whether the question is one of fact or law :

Unless the Commissioners, having found the relevant facts and put to themselves the proper question, have proceeded to give the right answer, they may be said, on this view, to have erred in point of law. If an inference from facts does not logically accord with and follow from them, then one must say that there is no evidence to support it. To come to a conclusion which there is no evidence to support is to make an error in law.

(M) In *Edward v. Bairstow*, Ref. 28 I. T. R. 579, the respondent embarked upon a joint venture to purchase a spinning plant with the object of holding it for quick resale and at a profit. The General Commissioners found that there was no venture in the nature of trade but the Court held that the facts found led inevitably to the conclusion that the transaction was a venture in the nature of trade and that Commissioners' inference to the contrary was erroneous.

Lord Simonds observed at page 587 that:

To say that a transaction is, or is not, an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure, but it is a question of law, not of fact, what are those characteristics...

At page 589 Lord Radcliffe pointed out :

I think that it is a question of law what meaning is to be given to the words of the Income Tax Act 'trade, manufacture, adventure or concern in the nature of trade' and for that matter what constitutes 'profits or gains' arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the Courts to interpret its meaning,

having regard to the context in which it occurs and to the principles which they bring to bear on the meaning of income;

and then at page 592 laid down the test in the following words:

When the case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person, acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.

(N) The dicta of Warrington, L. J., in *'Cooper v. Stubbs, Ref. 2 K. B., 753, at page 768 and 772,'* that intervention by a Court is proper only in a very clear case, where either the Commissioners have come to their conclusion without evidence which should support it, that is to say have come to a conclusion which on the evidence no reasonable person could arrive at, or have misdirected themselves in point of law, and of Atkin, L. J., that there may be a state of facts which can only lead to one conclusion of law, were quoted with approval by Lord Radcliffe at pages 589 and 592.

(at the same page) :

(O) The Privy Council in *'Commissioner of Income-tax v. Laxminarain Badridas, Ref. 5 I. T. R., 170 at page 179,'* said :

No question of law was involved : nor is it possible to turn a mere question of fact into a question of law by asking whether as a matter of law the officer came to a correct conclusion upon a matter of fact.

(P) Bose J., in *'Seth Suwalal Chhogalal v. Commissioner of Income-tax, Ref. 17 I. T. R., 269 at page 277,'* stated the test as follows :

A fact is a fact irrespective of the evidence by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient material.

Sufficiency of evidence was explained to mean whether the Income-tax authority considered its existence so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it exists."

9

Mixed Question of Law & Facts

This problem is very tough and needs detailed discussion available from the judgments of the Supreme Court. Guiding principles from English decisions have been discussed already in Chapter 8. In India, there is no marked difference or departure from these English Principles :

Case No. 133

In explaining this aspect of the matter aforesaid, our Supreme Court in '*Sree Meenakshi Mills Ltd. v. C. I. T., Madras, Ref. 31 I. T. R., page 28*', has observed thus :

Observation (at page 40-41) :

But it is argued against this conclusion that it conflicts with the view expressed in several English decisions, some of them of the highest authority, that it is a question of law what inference is to be drawn from facts. The fallacy underlying this contention is that it fails to take into account the distinction which exists between a pure question of fact and a mixed question of law and fact, and that the observations relied on have reference to the latter and not to the former, which is what we are concerned with in this case.

In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions

that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. To take an example, the question is whether the defendant has acquired title to the suit property by adverse possession. It is found on the facts that the land is a vacant site, that the defendant is the owner of the adjacent residential house and that he has been drying grains and cloth and throwing rubbish on the plot. The further question that has to be determined is whether the above facts are sufficient to constitute adverse possession in law. Is the user continuous or fugitive? Is it as of right or permissive in character? Thus, for deciding whether the defendant has acquired title by adverse possession, the Court has firstly to find on an appreciation of the evidence what the facts are. So far, it is a question of fact. It has then to apply the principles of law regarding acquisition of title by adverse possession, and decide whether on the facts established by the evidence, the requirements of law are satisfied. That is a question of law. The ultimate finding on the issue must, therefore, be an inference to be drawn from the facts found, on the application of the proper principles of law, and it will be correct to say in such cases that an inference from facts is a question of law. In this respect, mixed questions of law and fact differ from pure questions of fact in which the final determination equally with the finding or ascertainment of basic facts does not involve the application of any principle of law.

Case No. 134**Adventure in the nature of trade**

The next case on the subject is of '*G. Venkataswami Naidu & Co. v. C. I. T.*, Ref. 35 I. T. R., page 594.'

Facts :— That certain land was purchased by the managing agents and after some years transferred to the managed company on profits. It was an isolated transaction of the managing agent. It was contended that it was not an adventure in the nature of trade and profits could not be taxed. The Revenue contended that the intention from the very beginning was to make profit by selling it to the managed company so it was taxable profit. Decision was against the assessee. What is the scope of mixed question of law and fact : See passage reproduced below :

Principle (at page 601-02) :

In some cases, the point sought to be raised on reference may turn out to be a pure question of fact; and if that be so, the finding of fact recorded by the Tribunal must be regarded as conclusive in proceedings under section 66 (I). If, however, such a finding of fact is based on an inference drawn from primary evidentiary facts proved in the case, its correctness or validity is open to challenge in reference proceedings within narrow limits. The assessee or the revenue can contend that the inference has been drawn on considering inadmissible evidence or after excluding admissible and relevant evidence; and, if the High Court is satisfied that the inference is the result of improper admission or exclusion of evidence, it would be justified in examining the correctness of the conclusion. It may also be open to the party to challenge a conclusion of fact drawn by the Tribunal on the ground that it is not supported by any legal evidence; or that the impugned conclusion drawn from the relevant facts is not rationally possible; and if such a plea is established, the court may consider whether the conclusion in question is not perverse and should not, therefore, be set aside. It is within these narrow limits that the conclusions of fact recorded by the Tribunal can be challenged under section 66 (I). Such conclusions can never be challenged on the ground that they are based on misappreciation of evidence. There is yet a third class of cases in which the assessee or the revenue may seek to challenge the correctness of the conclusion reached by the Tribunal on the ground that it is a conclusion on a question of mixed law and fact. Such a conclusion is no doubt based upon the primary evidentiary facts, but its ultimate form is determined by the application of relevant legal principles. The need to apply the relevant legal principles tends to confer upon the final conclusion its character of a legal conclusion and that is why it is regarded as a conclusion on a question of mixed law and fact. In dealing with findings on questions of mixed law and fact the High Court would no doubt have to accept the findings of the Tribunal on the primary questions of fact; but it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly or not; and in that sense, the scope of enquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law.

Note :— So the problems of this nature whether it is income from adventure in the nature of trade is a mixed question of law and fact.

Case No. 135

In deciding the above case, Supreme Court had the occasion to consider the conflict of the views expressed in Scottish decisions and English decisions; but approved the view of Lord Radcliffe in one of the English cases :

Observation (35 I. T. R., at page 607) :

"When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If a case contains anything ex facie which is bad in point of law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no persons acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene." Lord Radcliffe remarked that the English courts had been led to be rather over-ready to treat these questions as pure questions of fact and added *"If so I would say with very great respect that I think it a pity that such a tendency should persist."* Therefore, it seems to us that in effect this decision is not inconsistent with the view we have taken about the character of the question raised before us in the present appeal. As we have already indicated, to avoid confusion or unnecessary complications it would be safer and more convenient to describe the question about the character of the transaction in the context as a question of mixed law and fact.

Case No. 136

In *G. Venkataswami Naidu's* case aforesaid, Supreme Court held, that transaction was adventure in the nature of trade, it also decided in *'Janki Ram Bahadur Ram v. C. I. T., Calcutta, Ref. 57 I. T. R., page 21,'* that in order to establish a transaction was an adventure in the nature of trade; onus was on the Department. It was a case of mixed question of law and fact.

(See : Case No. 54-A *supra*)

Case No. 137**Business Expenditure**

Next case is of *'Eastern Investments Ltd. v. C. I. T., West Bengal, Ref. 20 I. T. R., page 1,'* question arose whether interest paid on debentures was permissible deduction.

Facts :— Certain facts were found by the Tribunal from which they came to the conclusion that the dealing was not in the interest of the company and the expenditure of interest was not permissible deduction.

Supreme Court reversing Tribunals' judgment held that this being an investment company, if it borrowed money and utilised the same for its investments on which it earned income, the interest paid by it on the loans will clearly be a permissible deduction.

Principle (at page 4) :

Though the question must be decided on the facts of each case the final conclusion is one of law : Indian Radio & Cable Communication Ltd. v. The Commissioner of Income-tax, Bombay, Ref. 5 I. T. R., page 270, and Tata Hydro-Electric Agencies Ltd. v. The Commissioner of Income-tax, Bombay, Ref. 5 I. T. R., page 202.

(See : Case No. 58 *supra*)

Case No. 138

Business Expenditure

The next case is on expenditure in 'C. I. T., U. P. v. A. Tellery and Sons Pvt. Ltd., Ref. 63 I. T. R., page 288'.

Principle of law is stated thus (at page 291) :

The question, therefore, is a mixed question of fact and law. It is a question of law because the Tribunal has to determine what is the meaning to be given to the statutory phrase "expenditure laid out or expended wholly and exclusively for the purpose of such business." The proper construction of statutory language is always a matter of law and, therefore, the claim of the assessee in any particular case that he is entitled to a deduction of certain items of expenditure under section 10 (2) (XV) of the Act involves the application of the law to the facts found in the setting of the particular case.

Case No. 139

Business Expenditure

Payment of Compensation.

Next case is of 'C. I. T., Bombay City-I v. Greaves Cotton & Co. Ltd., Ref. 68 I. T. R., page 200,' in which the principle of law is stated thus :

Principle (at page 207-08)

It is true that the question referred to the High Court was a mixed question

of fact and law. In Eastern Investments Ltd. v. Commissioner of Income-tax, Ref. 20 I. T. R., page 1, it was held by this court that the question whether an expenditure was incurred solely for the purpose of carrying on the business of the assessee and was made on the ground of commercial expediency was not a pure question of fact but was a mixed question of fact and law which was subject to review by the High Court. Similarly, in a later case, Commissioner of Income-tax v. Royal Calcutta Turf Club, Ref. 41 I. T. R., page 414, this court reiterated the principle that though the question whether an item of expenditure was wholly and exclusively laid out for the purpose of the assessee's business must be decided on the facts of each case, the final conclusion was one of law because it involved the interpretation of the scope and meaning of the statute. To put it differently, the question whether the expenditure was laid out or expended wholly or exclusively for the purpose of business is a question which involves, in the first place, the ascertainment of facts by the Appellate Tribunal and, in the second place, the application of the correct principle of law on the facts so found. The question, therefore, is a mixed question of fact and law. It is a question of law because the Appellate Tribunal has to determine what is the meaning of the statutory phrase "expenditure laid out or expended wholly or exclusively for the purpose of business". The proper construction of the statutory language is always a matter of law and therefore the claim of the assessee in any particular case that he is entitled to deduction of certain items of expenditure under section 10 (2) (xv) of the Income-tax Act involves the application of the law to the facts found in the setting of the particular case. But this does not mean that in the hearing of a reference on this question the High Court is entitled to go beyond the findings of fact recorded by the Appellate Tribunal.

Question before the Supreme Court was that payment of compensation to the managing agents on premature termination of their managing agency was an expenditure allowable or not.

Held, that it was a mixed question of law and fact. Case was remanded to the Tribunal for the rehearing because they had not considered certain evidence which was filed before the A. A. C. and before the Tribunal in the form of the affidavit and very much relied upon.

Case No. 140

Business of Share Dealing

The next case is of '*Oriental Investment Co, Ltd. v. C. I. T., Bombay, Ref. 32 I. T. R., page 664*'.

Facts :— The petitioner company purchased during the period 1st. July, 1925, to 30th June, 1928, shares of the value of Rs.1,86,47,789/- major portion of which was comprised of shares in the Sassoon Group of Mills. During the year ended 30th June, 1929, the petitioner company promoted two companies known as Loyal Mills Ltd., and Hamilton Studios Ltd. and took over all their shares of the value of Rs. 10.5 lacs. In the year 1930, the petitioner company purchased shares of Rs. 1,33,930/-. During the period of 9 years from 1st. July, 1930, to 30th July, 1939, no purchases were made with the exception of a few shares of Loyal Mills Ltd. taken over from the staff of E. D. Sassoon & Co. Ltd., who retired from service. In the year ended 30th June, 1940, reconstruction scheme of the Appollo Mills Ltd. took place under which debentures held by the petitioner company in the Appollo Mills Ltd., were redeemed and the proceeds were reinvested in the new issue of shares made by the Appollo Mills Ltd. Out of the purchases of the value of Rs. 2,794/- made by the petitioner company during the year ended 30th June, 1941, Rs. 2,000/- was the value of shares of the Loyal Mills Ltd., taken over from the retiring staff. In the year ended 30th June, 1943, the petitioner company took over from the David Mills Co. Ltd., shares of the Associated Building Co., of the value of Rs. 56,700/-. After this there were no purchases at all to this date excepting purchases of the value of Rs. 34,954/- during the year ended 30th June, 1946.

The sales are contained in paragraph 3 (b) which may be quoted :

"In relation to the purchases made by the petitioner company as stated above no appreciable sales of shares were made during the period 29th July, 1924, to 30th June, 1942, the sales made in the year ended 30th June, 1929, of the value of Rs. 1,29,333/- included shares of the value of Rs. 45,000/- in the Loyal Mills Ltd., sold to the members of the staff and shares of the value of Rs. 83,833/- representing sterling investments handed over to the creditors of

the petitioner company in part repayment of the loan taken from them in the year ended 30th June, 1931, shares of the value of Rs 7,48,356/- were handed over to the creditors in payment of the loan granted by them. From the year ended 30th June, 1943, E. D. Sassoon & Co. Ltd., started relinquishing the managing agencies of the various mills under their agency and the shares held by the petitioner company in the Sassoon Group of Mills were handed over to the respective purchasers of the mills agencies."

Question was whether resultant profit or loss in these transactions were revenue or capital. And whether it was a mixed question of law and fact.

Held, the question was what are the characteristics of the business of dealing in shares or that of an investor is a mixed question of fact and law. What is the legal effect of the facts found by the Tribunal and whether as a result the assessee can be termed a dealer in shares or an investor is itself a question of law.

Note :— The mere fact that the company has within its objects the dealing in investment or shares, does not give to the company the characteristics of a dealer in shares, but if other circumstances are proved, it may be relevant for the purposes of determining the nature of the activities of the company.

Case No. 141

In this connection we may refer to the decision of the Supreme Court in '*C. I. T., Delhi & Rajasthan v. National Finance Ltd., Ref. 44 I. T. R., page 788.*'

In it, the Supreme Court admitted direct appeal from the judgment of the Tribunal because in their opinion very important question of law arose from the facts found by the Tribunal (See: Case No. 60 *supra*-Chapter 3). In other words the view is that whether the shares sale resulted in revenue profit or capital gains is always a question of law. Important fact relied upon was that shares purchased by the Bhalla group were very much higher than the market price prevailing for those shares at that time and so it was held to be a capital transaction. Device to alter the character of capital transaction into revenue could not be permitted and this was a serious question of law.

Case No. 142

Business of Share Dealing

The next case is of '*Dhirajlal Girdharilal v. C. I. T., Bombay, Ref. 26 I.T.R., page 736.*'

Facts :— The Hindu undivided family consisted of Girdharlal, head of the family and his sons: (1) Dhirajlal, (2) Hiralal and (3) Kirtilal. It was not doing any business in shares. Further, Girdharlal was a partner in a firm named Girdharlal Trikamlal. On his death, his sons and the widow received the assets in the form of these shares from the firm in which the deceased was a partner. Subsequently they sold some shares from which there was a profit to the tune of Rs. 1,42,025/-. The Revenue authorities included this amount as income from dealing in shares. The contention of the assessee was that it was never dealing in shares, and that they were only unloading stock which they received on the death of Girdharlal and the fresh purchases were merely with the intention of reinvestment. The A. A. C. did not accept the finding of the Income Tax Officer and knocked off the profit on the ground that the Hindu undivided family was not dealing in shares. The Tribunal agreed with I. T. O. .

Question arose whether a question of law arises from Tribunal's order.

Principle (at page 739) :

The question whether or not the Hindu undivided family was doing business in shares transferred to it by the firm is undoubtedly a question of fact; but if the court of fact, whose decision on a question of fact is final, arrives at this decision by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions, and partly on evidence, then in such a situation clearly an issue of law arises.

Case No. 143

Co-ownership

The next case is of '*Champan Cane Concern v. State of Bihar & Another, Ref. 49 I. T. R., page 152.*'

Question was whether the business of joint ownership was in point of law a co-ownership ? Supreme Court accepted the assessee's

appeal holding that there did arise mixed question of law and fact so High Court was in error.

Principle (at page 155) :

The High Court, however, took the question to be the one which it had asked the Board to refer to it and on that footing answered it against the assessee. The High Court said that the question whether the assessee was a co-ownership concern or a partnership firm was a question of fact, and even otherwise, there were facts and circumstances from which it was open to the taxing authorities to come to the conclusion that the firm was a partnership firm. On this footing the High Court answered the question against the assessee.

Note :— Therefore, who is the real owner of the business; to whom profits belong and what should be his status are such problems which involve question which is mixed question of law and fact.

Case No. 144

General Principles

Again we refer to the case of '*Sree Meenakshi Mills Limited v. G. I. T., Madras, Ref. 31 I. T. R., page 28.*'

Facts :— That assessee was a manufacturer and was making purchases of raw material and other articles for the use of his business by setting up a medium. He was showing purchases from 'A' and whereas 'A' was showing purchases from 'X' for a sum of Rs. 5,000/- and on the same date 'A' sold the same thing to assessee company for Rs. 8,000/-. Intermediaries were set up with a view to inflate the purchases. Similarly there were other methods by which he was under-stating sales. This device was found as a fact by the Tribunal.

Supreme Court agreed with the Tribunals decision regarding rejection of book profits and computation of income and said that it was a pure question of fact.

Principle (at page 61) :

"... it is not even of academic interest to refer the said question to the High Court. "On the question whether the fixation of ratio was correct, we are of opinion that it is a pure question of fact, and is not open to reference under section 66 (1).

General Principles of law (at page 50) :

1. *When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the Court under section 66 (1).*

2. *When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.*

3. *A finding on a question of fact is open to attack under section 66 (1) as erroneous in law when there is no evidence to support it or if it is perverse.*

4. *When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.*

Case No. 145

Joint Hindu Family

The next case is of '*V. D. Dhanwatey v. C. I. T., Madhya Pradesh, Nagpur & Bhandara, Ref. 68 I. T. R., page 365,*' in which question arose whether salary income of the Karta from the firm in which his Hindu undivided family was a partner could be treated as income belonging to the family. In other words whether it was Karta's individual income or H. U. F.'s income; it was held to be a mixed question of fact and law.

Principle (at page 375) :

It was finally contended on behalf of the appellant that the Appellate Tribunal had found that Shri V. D. Dhanwatey had earned the remuneration without any detriment to the family funds and the finding of the Appellate Tribunal on this point was a finding on a question of pure fact and the High Court could not, in a reference under section 66 (1) of the Income-tax Act, 1922, question the correctness or the validity of that finding. We are unable to accept the argument put forward on behalf of the appellant. It is true that the jurisdiction conferred on the High Court by section 66 (1) of the Income-tax Act is limited to entertaining references on questions of law. In the present case, however, the conclusion reached by the Tribunal is not a conclusion on a question of pure fact but it is a conclusion on a mixed question of law and fact. In other words, though the conclusion of the Tribunal is no doubt based

upon primary evidentiary facts, its ultimate form is determined by the application of the relevant legal principle of Hindu law which has been discussed in the course of this judgment. In dealing with findings on questions of mixed law and fact the High Court must no doubt accept the findings of the Tribunal on the primary questions of fact; but it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly or not in reaching its final conclusion; and in that sense, the scope of enquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law.

Note :— This problem have received attention of the Supreme Court in few other cases namely;

1. *C. I. T., West Bengal v. Kalu Babu Lal Chand*, Ref. 37 I. T. R., page 123;

2. *Jugal Kishore Baldeo Sahai v. C. I. T., U. P.*, Ref. 63 I. T. R., page 238;

3. *Piyare Lal Adishwar Lal v. C. I. T., Delhi*, Ref. 40 I. T. R., page 17;

4. *S. RM. CT. PL. Palaniappa chettiar v. C. I. T., Madras*, Ref. 68 I. T. R., page 221.

Case No. 146

Remuneration of Karta

Whether Income of family—Mixed Question of law and facts.

In the case of '*P. N. Krishna Iyer v. C. I. T., Kerala*,'

Whether the income is that of the Karta for the services rendered or it is the income of the H. U. F. whose funds were invested in earning that income is always a question of mixed question of law and facts. The test is stated by the Supreme Court :

"On the facts that the income was primarily earned by utilising the joint family assets or funds and the mere fact that in the process of gaining the advantage an element of personal service or skill or labour was involved did not alter the character of the income. In cases of this class the character of the receipt had to be determined by reference to its source, its relation to the assets of the family of which the recipient was a member and the primary object with which the benefit received was disbursed."

(See 70 I. T. R., Short Notes page 11)

Case No. 146-A

There is yet another case of i.e. '*C.I.T., Bangalore v. D.C. Shah.*'

Held, that Karta's remuneration was his individual income and not that of the Hindu undivided family because it was earned by him in consideration of his services rendered to the two firms as managing partner. Such income was not in consideration of family's funds invested in the two firms in which family was partner. The finding of fact was arrived at by examining clause in the partnership deed in which Karta's powers were to appoint and dismiss the staff, operate the Bank and manage all the affairs of the partnership business. So the salary was considered as his personal income.

(See 71 I. T. R., Short Notes page 27)

Case No. 147

Same Business

The next case is of '*Setabganj Sugar Mills Ltd. v. C. I. T., Central, Calcutta, Ref. 41 I. T. R., page 272.*'

Facts :— The assessee was carrying on business of manufacture and sale of Sugar. In the next year assessee carried on business in Hessian and other commodities also. Assessee claimed that loss suffered by him in sugar business should be given a set-off against profits made in Hessian business. I. T. O. allowed current year's loss but disallowed passed losses on the ground that two businesses were not same businesses. Tribunal decided the appeal against the assessee and also did not refer the case as in their opinion; there was no question of law.

Question arose whether two businesses constitute same business.

Held, that there was mixed question of law and fact and High Court should have asked for the reference.

Principle (at page 274) :

.....the real question is, was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses.

The learned judge also observed that what one had to see was whether the different ventures were so interlaced and so dovetailed into each other as to make them into the same business. These principles have to applied to the facts, before a legal inference can be drawn that a particular business is composed of separate businesses, and is not the same one. No doubt, findings of fact are involved, because a variety of matters bearing on the unity of the business have to be investigated, such as unity of control and management, conduct of the business through the same agency, the enter-relation of the businesses, the employment of same capital, the maintenance of common books of account, employment of same staff to run the business, the nature of the different transactions, the possibility of one being closed without affecting the texture of the other and so forth.

Case No. 148**Succession to the Business**

Next case is regarding succession to the business. In '*C. I. T., Madras v. K. H. Chambers, Ref. 55 I. T. R., page 674*', it was held that Tribunals finding was not pure finding of fact and there was a mixed question of law and fact whether succession occurred in particular circumstances.

Facts — "G", who carried on a business under the name of "C. and Co.", which had been taxed under the 1918 Act, finding that the business was running at a loss, handed it over to his son, "K", in 1932, after retaining the old liabilities and assets sufficient to discharge them, so that "K" could run the business without being burdened with heavy debts. "G" also retained the trade name of "C. and Co." "K" continued to operate the same lines of business, but in his own name, taking over the constituents of that business, using the same premises, telephone number, post box number, private codes and the trade marks and important sections of the staff belonging to "C. and Co.". On January 1, 1948, "K" transferred the business to a limited company. For the assessment year 1948-49 "K" claimed relief under Section 25 (4) of the Indian Income-tax Act, 1922, but the claim was not allowed by the Income-tax Officer on the ground that "K" did not take over the business of "G" "as a whole running concern" and the business carried on by him was not the same business which was originally assessed under the 1918 Act:

I. T. O. held, that there was no totality of succession of the business from father to son. So in 1932, the business was not succeeded to as such. The A. A. C. and the Tribunal confirmed the assessment.

Question before the High Court was whether son succeeded to the business of his father in 1932, could he claim relief of no tax payment in 1948, when he suspended the business and became entitled to relief under Section 25 (4) of the old Act. High Court answered the question by saying that there did take place succession in 1932. Supreme Court agreed with High Courts' decision on the following:

Principle of law (at page 682) :

The expression "succession", as stated by Simon in his book on Income Tax, has acquired a somewhat artificial meaning. The cases we have considered supra and similar others have laid down some tests, though not exhaustive, to ascertain whether there is succession in a given case or not. The tests of change of ownership, integrity, identity and continuity of a business have to be satisfied before it can be said that a person "succeeded" to the business of another. Unless the facts found by the Tribunal satisfy the said tests, the finding cannot be conclusive. The tests crystallized by decisions have given a legal content to the expression "succession" within the meaning of section 25 (4) of the Act and whether facts proved satisfy those tests is a mixed question of law and fact.

Appellate Tribunal's Direct Appeal in Supreme Court

There are three decisions of the Supreme Court which indicate circumstances wherein they have interfered with the judgment of the Appellate Tribunal by entertaining the appeal direct from its order.

Case No. 149

In C. I. T., Delhi & Rajasthan v. National Finance Ltd., Ref. 44 I. T. R., page 788; it is said :

“Though the Supreme Court would not ordinarily entertain an appeal directly from an order of the Appellate Tribunal bypassing the High Court, the Supreme Court has power to do so in special and exceptional circumstances.

In this case their Lordships granted special leave to appeal from the order of the Appellate Tribunal, heard the appeal, and reversed the order of the Tribunal.”

While explaining the circumstances in which they had entertained appeals in two earlier cases viz. in ‘*Dhakeswari Cotton Mills Ltd. v. C. I. T.*, Ref. 27 I. T. R., page 126’, and ‘*Sardar Baldev Singh v. C. I. T.*, Ref. 40 I. T. R., page 605’. The Supreme Court observes to say that the present case is somewhat similar and direct appeals from the judgment of the Tribunal should be entertained to meet the ends of natural justice.

Observation (44 I. T. R., at page 792) :

In our opinion, in the present case also, special circumstances which justified the grant of special leave in 'Baldev Singh's case' exist. There was a combination of circumstances which led to the filing of the application a day late, but in circumstances showing that the default was not due to any negligence on the part of the Commissioner of Income-tax. The receipt of the notice on July 15 is admitted; but the affixing of the date stamp on the 16th was due to the failure of the clerk to deal with the notice on the 15th because he fell ill and had to leave the office. It is common knowledge that date stamps are altered every day in the office, and this is done mostly by a very junior employee. The affixing of the date stamp on 16th and the notice consequently bearing that date went unnoticed, and relying upon the date stamp, the appeal was filed, though on the last day of limitation but within time. In these circumstances, it is difficult to say that the Commissioner of Income-tax was negligent, and the negligence, if any, on the part of the clerk in affixing a wrong date stamp is excusable, if one considers his illness and his absence from the office on the 15th. In our opinion, this case comes within the rule of 'Baldev Singh's case' and an appeal direct to this court from the Tribunal's order is justified by the special circumstances.

Facts :— Though the order was served on the Commissioner on 15th July, 1957, the clerk concerned was ill on that date and he made a note that it was served on 16th July, 1957. To this effect an affidavit was given. That, therefore, the time limit was lost by the C. I. T. in filing reference in the High Court which was belated by one day. So the C.I.T. filed direct appeal in the Supreme Court from the judgment of the Tribunal.

Case. No. 150

The second case is '*Dhakeswari Cotton Mills Ltd. v. C. I. T., West Bengal*, Ref. 26 I. T. R., page 775'.

Facts :— The assessee company was assessed on estimate by rejecting accounts. The company had shown heavy wastage and little profits. Comparable cases were not looked into by the Appellate Tribunal—rather the gross rate was confirmed by the Appellate Tribunal by rule of thumb. Under section 66 (1) they refused the case as in their opinion there was no question of law.

Under section 66 (2) the High Court also did not call for the statement of the case.

Question was whether under article 136 Supreme Court could entertain direct appeal and decide the question of correctness of the judgment of the Tribunal.

Held, That it was a fit case in which Supreme Court could interfere with the judgment of the Tribunal. It was not based on any materials and gross rate applied was pure guess. Natural justice demands interference.

Note :—When the constitution empowered the Supreme Court with over-riding powers it trusted the wisdom of the Supreme Court judges who could interfere in exceptional cases even though the case has reached finality at some stage or the other under the Act. The Appellate Tribunal may have reached the conclusion on finding of fact, but if in the opinion of the Supreme Court there is a gross miscarriage of justice, it can interfere with the judgment of the Appellate Tribunal.

Case No. 151

Third case is of '*Sardar Baldev Singh v. C. I. T., Delhi & Ajmer, Ref. 40 I. T. R., page 605*'.

The assessee was allowed to file an appeal in the Supreme Court and argue the case on merits because the view expressed is:—

“That as the court had thought it fit to grant leave to appeal, notwithstanding that the appellant could have availed himself of the remedy provided by the Act and was by his own conduct unable to do so, the appellant was entitled to proceed with the appeal, especially as he intended to confine himself to questions of law arising from the order of the Tribunal.”

Case No. 152

The fourth case in which the Supreme Court expressed the opinion that they would not bypass the jurisdiction of the High Court in reference and allow leave to appeal direct from the order of the Board of Revenue in Sales-tax case is '*Chandi Prasad Chokhani v. State of Bihar, Ref. 43 I. T. R., page 498*', in which facts and decision were :

Facts :— The appellant was assessed to tax under the Bihar Sales Tax Act, 1947, on its turnover for three accounting periods. As its contention that purchases made on behalf of two other jute mills outside Bihar and despatches of goods to its own firm outside Bihar were not "sales" within the meaning of that Act was not accepted, the appellant preferred appeals to the Deputy Commissioner but was unsuccessful. The appellant filed revision applications under Section 24 of the Act to the Bihar Board of Revenue. The Board dismissed the petitions by its orders and also refused to state a case under Section 25 (I) of that Act to the High Court. The appellant then moved the High Court to direct the Board to state a case. The High Court dismissed the applications in regard to the first two accounting periods but directed a question to be stated in regard to the third period and answered that question, when referred, against the appellant. Therefore, the appellant applied to the Supreme Court under article 136 of the Constitution of India for special leave to appeal from the orders of the Board dismissing the revision applications for the first two accounting periods and the order refusing to state a case for the third period; and the Supreme Court granted special leave. The appellant did not apply for or obtain any leave to appeal from the orders of the Board refusing to state a case for the first two periods or the orders of the High Court refusing to direct the Board to state a case for the first two periods and the order of the High Court answering the question referred to it in regard to the third period. On the appeals coming before the Supreme Court for hearing :

Held, (i) that there was no distinction in the scope of the exercise of the power of the Supreme Court under article 136 of the Constitution of India at the stage of the application for special leave and at the stage when the appeal was finally disposed of and it was open to the court to question, at the time of the hearing of the appeal, the propriety of the leave already granted.

Baldota Brothers v. Libra Mining Works (1961) A. I. R., 1961 S. C. 100 followed.

(ii) That sections 23, 24, and 25 of the Bihar Sales Tax Act could not override the provisions of the Constitution or affect the powers of the Supreme Court under article 136 of the Constitution.

The Supreme Court had power to grant special leave from the orders of the Board.

(iii) That, however, save in exceptional and special circumstances such as were found in the cases of '*Dhakeswari Cotton Mills, Ref. 27 I. T. R., page 126*', and '*Sardar Baldev Singh, Ref. 40 I. T. R., page 605*', the Supreme Court would not exercise its power under article 136 in such a way as to bypass the High Court by entertaining appeals from the orders of a Tribunal and ignore its decisions which became final and binding on the parties. The object of sections 23, 24 and 25 of the Bihar Act was to avoid a conflict by making the decisions of the assessing authorities, subject to appeal, revision or review, final on questions of fact and the decision of the High Court, subject to an appeal to the Supreme Court, final on questions of law under Section 25 of the Act.

Principle (at page 510) :

There are no special circumstances justifying the exercise of such power; on the contrary the circumstances are such that it would be wrong both on principle and authority to allow the appellant to bypass the High Court by ignoring its orders. In our view, special leave was not properly given

Case No. 153

Fifth case is of '*Kanhaiyalal Lohia (Deceased) Mahabir Prasad Khemka & others v. C. I. T., West Bengal, Ref. 44 I. T. R., page 405*'.

Facts :— That the assessee made a gift of Rs. 5,11,101/- in favour of his brother Brijlal and Rs. 2,50,000/- in favour of his brother's son Nand Kishore sometimes in July 12, 1943, and September 30, 1943. Thereafter a business owned by the assessee was closed and his brother with his son constituted a partnership with the gifted money as its capital. This partnership was registered under the Income-tax Act. However, in the assessment of the assessee, its profits were again included. The assessee challenged the matter and succeeded before the Appellate Assistant Commissioner in appeal. But he lost the appeal before the Tribunal on the ground that the statement of one Mr. A. L. Mazumdar who drafted the partnership deed went against him. An opportunity was given for cross-examination of Mr. A. L. Mazumdar which was not availed of.

The question was whether Appellate Tribunal finding could be challenged in the High Court.

Held, that it is a finding of fact arrived at by the Appellate Tribunal based on evidence and there is no irregularity so far as natural justice was required to be done.

High Court did not call for the statement of the case. No further steps were taken to go to the Supreme Court instead assessee filed direct appeal to the Supreme Court from the judgment of the Tribunal. Direct appeal to the Supreme Court cannot lie under article 136 in a case like this.

Principles (at page 409) :

1. that a circumstance which cannot be corrected by the procedure of a stated question of law on a statement of the case may afford a ground for invoking the jurisdiction of this court under article 136. That ratio does not apply, where a question of law can be raised, and is capable of being answered by the High Court or, on appeal, by this court. (at page 410) :

2. it is quite clear that the gifts were not only real, but were acted upon. This was a matter within the jurisdiction of the Appellate Tribunal as the final fact-finding authority. The Tribunal acted within its powers in refusing to accept the evidence tendered, and looking at the circumstances of the case, we cannot say that the finding has been perversely reached.

(at the page 411) :

3. In our opinion, no special circumstances exist, on which the appellants can claim to come to this court against the decision of the Tribunal, by-passing the decision of the High Court on the question referred and the refusal of the High Court to call for a statement of the case from the Tribunal on questions which the Tribunal refused to refer to the High Court.

Case No. 154

The sixth case is of '*Chimmonlall Rameshwarlall v. C. I. T. (Central)*, Calcutta, Ref. 37 I. T. R., page 415'.

Facts :— The assessee was entitled to principal and interest from 'A' State of Nawab. The State had gone into the hands

of Administrator. Assessee had received certain amounts in four years falling in assessment years 1938-39 to 1941-42. All the four assessments were made by not including the amount of interest received from Nawab's State, but in re-assessment proceedings the amounts were brought to charge. Appeal before the Appellate Assistant Commissioner and before the Appellate Tribunal failed. The assessee moved an application of reference requesting the Tribunal to refer the case to the High Court which was also refused. Then in the High Court he moved an application which was also refused as in their opinion there was no question of law. Now the assessee filed a direct appeal in the Supreme Court against the order of the Tribunal passed under Section 66 (1) of the Act of 1922. But no direct appeal from the judgment of the Tribunal itself was filed.

Under these circumstances, question arose whether Supreme Court who had given special leave could refuse to decide appeal on merits.

Held, that it would not by-pass the jurisdiction of the High Court and decide appeal on merit. Preliminary objection of the Revenue by Solicitor-General was accepted.

Principle (at page 418) :

The procedure laid down in the Income-tax Act having provided for an application under section 66 (2) of the Act to the High Court at the instance of the party aggrieved by the order made by the Tribunal under section 66 (1) of the Act, it is extremely doubtful if an appeal would be entertained against such an order under section 66 (1) of the Act even under the jurisdiction which we exercise under article 136 of the Constitution howsoever wide it may be.

Case No. 155

The next case is of '*A. Govindarajulu Mudaliar v. C. I. T., Hyderabad, Ref. 34 I. T. R., page 807*', in which also cash deposits were treated as income of the assessee from undisclosed sources and held to be his income. Tribunal's order was a finding of fact. Direct appeal in the Supreme Court was not entertained from the judgment of the Appellate Tribunal. (See : Case No. 75 *supra*)

II

High Court's Power & Jurisdiction

The scope and jurisdiction of the High Court are very narrow. It has to decide the exact question under reference. The same limitations are imposed upon the power of the Supreme Court in deciding appeals arising out of the references answered by the High Court. To this effect there are the observations in the judgment of the Supreme Court.

Case No. 156

In C. I. T., Andhra Pradesh v. Krishna & Sons, Ref. 70 I. T. R., page 733, passage extracted from page 734 :

The jurisdiction of the Supreme Court arising in appeal over the judgment of the High Court on a reference under the Income-tax Act is also advisory, the Supreme Court can only record its opinion on questions which are referred; not on questions which could have been, but have not been referred.

Therefore, the High Court's jurisdiction, duty and power in deciding references under Income-tax Act can best be understood by examining decided cases. Three chapters (11, 12 & 13) hereinafter have been devoted to this problem.

Case No. 157

Academic question

Where question of law does arise, reference must be called for though the answer is obvious.

(See : *Mathura Prasad v. C.I.T., U.P.*, Ref. 60 I.T.R., page 428 also)

In C. I. T., Ernakulam v. Managing Trustee, Jalakhabai Trust, Ref. 66 I. T. R., page 619.

Principles of law stated thus (at page 621) :

1. In our judgment, a question arose out of the order of the Tribunal. The Tribunal was called upon to interpret the directions contained in clause 13 (b) of the deed and it proceeded to interpret that clause. The true legal effect of the directions contained in clause 13 (b) of the deed of trust raises a question of law which arose out of the order of the Tribunal and the High Court erred in failing to direct that a statement of case in so far as it related to the 1/8th share of the income of properties in schedules B and C be submitted.

(at page 622) :

2. in dealing with the application under section 66 (2) of the act is not called upon to decide whether the question may ultimately be decided in favour of the assessee; the High Court had only to consider whether a question of law which may be supported by reasonable argument, arose out of the order of the Tribunal.

Case No. 157-A

Academic Question

That in a given case Question arises whether salary of the Karta of the Hindu undivided family could be treated as his Individual Income or the Income of his Hindu undivided family.

Though Supreme Court has held in Subsequent case refer 68 I. T. R., page 365, that it is a mixed question of law and fact but in '*Mathura Prasad v. C.I.T., U.P.*, Ref. 60 I.T.R., page 428,' it is held that the question was purely academic and covered by the judgment of the Supreme Court in '*Kalu Babu Lal Chand's case*, Ref. 37 I. T. R., page 123.' So reference was not necessary.

Facts :—(In Mathura Prasad's case were as follows) :—

A Hindu undivided family owned considerable property and carried on many businesses. There was a partition among the six branches in the family and a sixth share of the property was allotted to the smaller Hindu undivided family of which "M" was the manager. After partition, the managers of the six branches entered into an agreement of partnership to carry on the businesses. Under the

agreement, "M", who was to manage the affairs of one of the offices, was entitled to a monthly allowance of Rs. 1,500/- such allowance not exceeding the profits disclosed at that office. It was conceded before the Tribunal that "M" had entered into partnership as representing his smaller Hindu undivided family for the benefit of the family. The Tribunal further found that "M" became a partner with the help of joint family funds and that the allowance received by him was directly related to the investment of the family funds in the partnership business; and accordingly his allowance was taxed as the income of the smaller Hindu undivided family in its hands. The appellant thereupon applied for a reference of the question whether the allowance was the income of the Hindu undivided family or of "M" in his personal capacity. Both the Tribunal and the High Court were of the view that the question sought to be raised was concluded by the judgment of the Supreme Court in *Commissioner of Income-Tax v. Kalu Babu Lal Chand* (1959) 37 I. T. R., 123 (S. C.) and that, therefore, it need not be referred for opinion.

Case No. 158

Advisory

High Court's duty and Jurisdiction defined in as much as it is purely Advisory—It does not sit as in Appellate Court—Explanation if not found satisfactory and there are Materials to support the Assessment—Such a finding is a Finding of Fact and no interference is called for.

In Newton Cikli Collieries Ltd. v. C. I T., Madhya Pradesh & Bhopal, Ref. 44 I. T. R., page 495.

Facts :— In so assessing the assessee company, the Income-tax Officer added back a sum of Rs. 50,000/- on the ground that expenses under the head "wages and salaries" were inflated to that extent by the assessee company. The assessee company showed a sum of Rs. 12,18,409/- as expenses under the head "wages and salaries" for the year in question as against Rs. 8,04,766/- for the preceding year. The Income-tax Officer examined certain comparative figures of the coal despatched, wages and salaries claimed, and cost of raising per 100 tons of coal. These comparative figures raised a suspicion in the mind of the Income-tax Officer and he asked the assessee company to explain the reason for the abnormal increase in wages and salaries in the year of account.

So far as the workmen on weekly wages were concerned, the assessee company stated that no acquittance rolls existed, for workmen on monthly wages acquittance rolls were produced. They revealed that most of the payments were acknowledged by persons other than the payees and even in the case of literate persons like engineers, payments were acknowledged by other persons by affixing their thumb impressions on the acquittance rolls. There were also cases in which there were no acknowledgements at all.

The High Court held that there were sufficient materials before the Revenue authorities to make such an assessment and there was no question of law. The Supreme Court agreed with the decision of the High Court.

Held, (i) that the finding of the authorities that the wages had been inflated was a finding of fact and that this finding could not be held to be based on no material;

(ii) the non-acceptance of the explanations given by the assessee could not convert the question of inflation of wages which was essentially a question of fact into a question of law.

Principle (at page 498) :

Neither the High Court nor this court sits in appeal over the assessments in question. As in the High Court so also before us, the short question is whether there was any material before the Tribunal for the finding that the wages had been inflated. If there was such material from which a reasonable inference as to inflation of wages could be drawn, the matter is at an end.

Case No. 159

Advisory

High Court's Jurisdiction Advisory-Tribunal should carefully draw the questions not too narrow and should attempt to avoid hardship upon the Assessee by making a complete reference—Piecemeal reference not fair to the Tax-payer.

In Indian Molasses Co., Pvt., Ltd. v. C. I. T., (W. B.), Ref. 37 I. T. R., page 66.

Facts :—That there were certain payments of annuity, the question was whether it was an expenditure wholly laid out for the purposes of business and was allowable or not. The Appellate Tribunal

decided only one aspect of the matter, falling under Section 10(2)(XV) of the Income-Tax Act 1922, i. e. what was the meaning of the word "Expenditure and whether it was Expenditure or not. The other link of the same section—whether it was wholly and exclusively laid for the purposes of business—was not decided. The remark was to the effect that let the High Court decide this issue first and the Tribunal will decide the second issue later on. When the question of law was canvassed before the High Court Counsel of the Assessee limited his arguments to the question of law and canvassed that no further arguments should be advanced by the Revenue authorities. On the second link Division Bench of the Calcutta High Court did not call for any additional statement of the case from the Tribunal, but answered the question saying that their scope was limited in a reference case. Then the question came before the Supreme Court and it found that the manner in which the Tribunal has referred the question created hardship upon the tax-payer because repeated reference was necessary to answer the full dispute in the tax assessment.

The dictum of the Supreme Court on the subject is at *page 72* reproduced below :—

"The learned Attorney-General who appeared for the Department at once conceded the difficulty of answering the question, but contended that the question in its present form could be answered, though he agreed that if it could not, the court would be free to say so. We cannot help saying that though the Tribunal may be at liberty to decide a case as appears best to it, there is considerable hardship to the tax-payers, if questions of law are decided piecemeal and repeated references to the High Court are necessary. The jurisdiction of the High Court is advisory and consultative, and questions of interpretation of the law in this attenuated form can well be avoided. This will tend to cut down the duration of litigation.

In deciding that the payment of the lump sum and premia was not "expenditure, different views were expressed as the case progressed."

So the view of the Supreme Court is that the Tribunal must finally dispose off the appeal on all the aspects of the matter before it, and then draw the inference, and should not keep to itself

certain points reserved to be answered after the reference has been disposed off by the High Court in the first instance.

Case No. 160**Arguable Question & Duty**

Where fairly an Arguable Question of law arises from the Judgment of Appellate Tribunal—It is the Duty of the High Court to call for the statement of the case.

In C. I. T., Delhi & Rajasthan v. Shri Govind Commercial Co. (P.) Ltd., Ref. 61 I. T. R., page 169.

Facts :— That Appellate Tribunal gave a decision on interpretation of Section 24 (I) read with explanation there to regarding delivery of scrips while deciding the question whether it was speculative loss or not. The Commissioner asked that Appellate Tribunal's order gave rise to the following two questions of law :—

1. Whether the Tribunal was right in holding that there was actual delivery of the commodity within the meaning of Explanation 2 to Section 24 (1) ?

2. Whether the term "scrips" in that Explanation can refer to scrips pertaining to any commodity ?

Held, that the Tribunal in refusing to refer the case to the High Court was in error in as much as the fairly arguable question of law did arise from the judgment of Appellate Tribunal.

Case No. 161**Civil Suit & Refund of Tax**

Where the Appellate Authority under a Taxing Statute declares a Collection of the Tax by the Revenue authority to be unauthorised, proper remedy for claiming the refund of the Tax from State is the Civil Suit and not the Writ under Article 226.

In Suganmal v. State of Madhya Pradesh & Others, Ref. 56 I. T. R., page 84.

The writ of mandamus for the recovery of the sum of Rs. 62,809-5-2 alleged to have been realized by the respondent between 1944 and 1948; was found to be unauthorised.

Writ was filed by the assessee in the High Court for claiming the refund. The High Court refused to admit the writ. The Supreme Court confirmed the action of the High Court.

Principles (at page 86-87) :

1. the High Courts have power to pass any appropriate order in the exercise of the powers conferred under article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax.

(at page 90) :

2. Reference is made to section 72 of the Contract Act for the contention that the State is duty bound to return the amount to the appellant. Whether the case of the appellant falls under the provisions of that section would be a point for decision in a regular suit and not in the proceedings under article 226.

Note :—That in this case, arising out of the same controversy State granted the refunds to the assessee for the year after 26 January, 1950, whereas they refused to grant refunds for the earlier years.

Case No. 162

Duty

Duty of the High Court in a reference before Applying some other decision must examine the Evidence laid by the Assessee to establish his case.

In C. I. T., West Bengal v. Calcutta Agency Limited, Ref. 19 I. T. R., page 191.

Contention of the assessee before the Revenue authorities was that the amounts deducted by the Company from the Managing Agencies commission was not his income and subsequently he argued before the Appellate Tribunal that it was a case of deduction which should be allowed against his other incomes.

Held, that the assessee did not lead any evidence to establish his case. It was also held that the burden was upon the assessee to prove the facts for exemption of an amount which he claims as a deduction. High Court's duty is defined in the following terms :—

Principle (at page 197) :

The statement of the case under the rules framed under the Income-tax Act is prepared with the knowledge of the parties concerned and they have a full opportunity to apply for any addition or deletion from that

statement of the case. If they approved of that statement that is the agreed statement of facts by the parties on which the High Court has to pronounce its judgment. In the present case, the parties perused the statement of case and as disclosed by the note made at the end of it had no suggestions to make in respect thereof. It is, therefore, clear that it was the duty of the High Court to start with that statement of the case as the final statement of facts. Surprisingly, we find that the High Court, in its judgment, has taken the argument of Mr. Mitra as if they were facts and have based their conclusion solely on that argument. Nowhere in the statement of the case prepared by the Tribunal and filed in the High Court, the Tribunal had come to the conclusion that the payment was made by the assessee company to avoid any danger of public exposure or to save itself from scandal or in order to maintain the managing agency of the appellant company. The whole conclusion of the High Court is based on this unwarranted assumption of facts which are taken only from the argument of counsel for the present respondents before the High Court. The danger of failing to recognise that the jurisdiction of the High Court in these matters is only advisory and the conclusions of the Tribunal on facts are the conclusions on which the High Court is to exercise such advisory jurisdiction is illustrated by this case.

Case No. 163**Duty & No remand of the case necessary**

The High Court in not remanding the case was right because the Commissioner had not raised the issue before the Tribunal.

In C. I. T. v. Bhurangya Coal Co., Ref. 34 I. T. R., page 802.

Facts :— (Facts of the case may be seen in Case No. 103 *supra*)

The Commissioner raised the question before the High Court regarding distinction between movable and immovable property sale which point was not raised in the Tribunal. The argument was advanced that this new point be allowed to be raised. High Court did not set aside the Tribunal's order and held, that Appellate Tribunal was fairly justified in coming to the conclusion which was correct. The Commissioner, if he wanted to raise the question whether there can be a distinction between the two sales, should have raised it before the Appellate Tribunal, and he cannot raise it now in the High Court for the first time and ask them to remand the case.

Principle of law (at page 803) :

1. *That, the Commissioner ought to have applied to the Tribunal itself to order further enquiry in regard to the question of distinction between movable and immovable properties, and not having done so he had no right to require the High Court to remand the matter for that purpose, and the High Court was, therefore, justified in refusing to remand the case.*

(at page 807) :

2. *On a construction of the two documents, we are of opinion that what were intended to be sold and what were actually sold under the deed dated the 17th May, 1946, were only the properties mentioned in part I of the schedule and not any items included in part 2 and that the intention was to sell the fixtures as movables.*

Case No. 164

Duty to answer Exact Question

High Court Jurisdiction - Question of law - Power to decide specifically the Question referred to-No power to remand or set aside Tribunal's order.

In C. P. Sarathy Mudaliar v. C. I. T., Andhra Pradesh, Ref. 62 I. T. R., page 576.

Facts :—That the Company had given loan to H. U. F. of which "X" was a Karta and the Managing Director. The company was private Ltd., Co. in which Public was not substantially interested. The "X" was holding 2,000 shares of this company. Two other members of the family were holding 100 shares each. The loan was treated by the Department as dividend income of the H. U. F.. Other dividend income declared as shares of the 3 members was included in the H. U. F. assessment. Managing Director's remuneration was treated as H. U. F. income. The question was whether loan also could be considered income of the H. U. F.. The appeal was allowed in favour of the assessee holding that H. U. F. cannot be registered as a share-holders of the company, so loan not dividend income of the family. In the High Court, Tribunal's judgment was set aside asking them to reconsider this problem with reference to other Sections of the Income-tax Act i. e. whether it was dividend income within the meaning of Section 2(6A) e.

The Assessee went in appeal to the Supreme Court. The High Court's order was set aside on the following Principle :-

(at page 577-78) :

We need express no opinion on the correctness or otherwise of the view expressed by the High Court in this judgment, for we are clearly of the view that the procedure followed by the High Court is erroneous. The High Court, in a reference under section 66 of the Income-tax Act, is exercising advisory jurisdiction; it is not sitting in appeal over the judgment of the Tribunal. If a question is raised by the Tribunal and referred to it, it is the function of the High Court to answer that question. The Tribunal will thereafter give effect to the opinion of the High Court. If the High Court finds that material facts are not stated in the statement of the case or the Tribunal has not stated its conclusions on material facts, the High Court may call upon the Tribunal to submit a supplementary statement of case under section 66 (4). But the High Court has no power to set aside the order of the Tribunal even if it is of the view that the Tribunal has not considered the question which, in the opinion of the High Court, should have been considered. The High Court must answer the question posed before it; thereafter, it is the duty of the Tribunal to pass such orders as are necessary to give effect to the judgment of the High Court conformably to that judgment.

Case No. 165

Duty to answer Exact Question

The High Court should be confined to the exact question in issue. Penalty amount was deducted from the bills of the assessee by the Government. The Tribunal held, that it was allowable. The High Court answered the question differently by looking into some other provisions of the Act which was not considered by the Tribunal. The High Court's order was set aside by the Supreme Court.

In Prafulla Kumar Malik v. C. I. T., Bihar & Orissa, Ref. 63 I. T. R., page 62.

Facts :—That the assessee was a grain-merchant and supplied goods to the Government. Instead of supplying exact quality at fair standard rates, he supplied inferior quality to the Government. The Government imposed penalty and deducted the amount from his pending bills. This penalty amounted to Rs. 25,700/- which the assessee claimed that it was not his income and was not liable to be

assessed under Section 10 (1) of the Income Tax Act, 1922. I. T. O. and A.A.C. rejected the assessee's claim. The Tribunal held, that it was not the income of the assessee under Section 10 (1) of the Income-tax Act, 1922. So the penalty amount deducted from the bills was excluded from the assessment. However, in framing the question of law, they referred the following question to the High Court :—

“Whether, on the facts and in the circumstances of the case, the amount of Rs. 25,700/- paid by the assessee by way of penalty to the Government of Orissa should be an admissible deduction under Section 10 (1) of the Income-tax Act, 1922 ?”

The High Court answered the question against the assessee on the ground that the amount of penalty cannot be deducted under Section 10(2)(xv) of the Income-tax Act, 1922. **Held**, framing of the question was in unhappy terms; because it referred to the word “deduction” in the question of law which was an error. That the High Court cannot travel beyond the scope of the question referred to it and answer the point by making use of Section 10 (2) (xv) which was not the subject matter for consideration.

Principle of law (at page 64) :

It is quite obvious that the High Court, in answering the question on this basis, misdirected itself and totally misunderstood the question that was referred to it for opinion by the Tribunal. The appellant had at no stage contended that the Tribunal had wrongly held that this sum of Rs. 25,700/- was not deductible under section 10 (2) (xv) of the Act as expenditure wholly and exclusively laid out for the purpose of the business, nor was this proposition the subject matter of the question which was referred by the Tribunal for opinion to the High Court. In answering the question on this basis, therefore, the High Court did what it was not at all called upon to do and, thus, committed a clear error.

Case No. 166

Duty to interpret Statutory Language

Where the Appellate Tribunal's findings are erroneous in law because of a wrong approach to a statutory provision, the finding cannot be conclusive as finding of fact. The High Court should properly interpret statutory provision and is not bound by the Tribunal's judgment.

In Liquidators of Pursa Ltd. v. C. I. T., Bihar, Ref. 25 I. T. R., page 265.

Facts :— That in the course of winding up, there was a sale of the whole factory. Revenue authorities treated the surplus from sale of machinery and plant over and above the written down value as taxable under Section 10 (2) (vii) of the Income-tax Act, 1922, as income. The assessee contended that it was a case of winding up resulting in capital receipts and surplus was not income. The Appellate Tribunal confirmed the assessment treating the amount as income from trade. The High Court confirmed the Tribunal's order as finding of fact. The Supreme Court reversed the order of the Tribunal on the ground that it was vitiated by wrong approach to interpret the provisions of the Act. It was truly a case of winding up and surplus was a capital receipt; the High Court's duty explained.

Principle of Law (at page 273) :

Although the High Court will not disturb or go behind the finding of fact of the Tribunal, it is now well settled that where it is competent for a Tribunal to make findings in fact which are excluded from review, the appeal court has always jurisdiction to intervene if it appears either that the Tribunal has misunderstood the statutory language – because the proper construction of the statutory language is a matter of law – or that the Tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it. (See Lord Normand in Commissioners of Inland Revenue v. Fraser, Ref. 24 T. C., 498 at page 501). It appears to us that the Tribunal misdirected itself in law as to the meaning and import of the relevant provisions of Section 10 of the Act.

Case No. 167

Jurisdiction

High Court's Jurisdiction is Advisory—It must answer the Question referred to it—It cannot travel beyond the Question canvassed in the Lower Court.

In State of Uttar Pradesh v. Raja Yadvendra Datt Dube, Ref. 60 I. T. R., page 221.

The case, under the Agricultutal Income-tax Act, U.P. Government, could not successfully canvass its case before the High Court or

even in the Supreme Court when it appealed against the order of the Board quashing reassessment proceedings.

The following is the legal principle of law which is of general application even for Income-tax purposes :

Principle of law (at page 225)

It is necessary to remember that these proceedings come before us in appeal against the order passed by the High Court on a reference made under section 24. Jurisdiction of the High Court under section 24 is advisory : the High Court must answer the question referred to it and cannot travel outside the terms of reference. This caution is necessary because learned counsel appearing for the parties have sought to canvass many questions which were never raised before the Board and even before the High Court. The question whether the order passed by the Board setting aside the orders of assessment of the Sub-Divisional Officer and of the Collector and even of the Commissioner is justifiable in law is not referred to us. We are only concerned to deal with the limited question whether the Board had authority on the view expressed by it to make the order directing reassessment, and that question must be decided in the light of the provisions of section 15 (3) and section 25 of the Act.

Case No. 168

Jurisdiction

High Court's Jurisdiction does not extend to answering—Factual points which are not considered by the Tribunal – How much is the Income Accruing on Manufacture and how much on Sale—Fixing proportion or ratio not done by the Tribunal—High Court should not do it.

In C. I. T., Delhi & Rajasthan v. Mewar Textile Mills Ltd., Ref. 60 I. T. R., page 423.

Principle of law (at page 424) :

Mr. Sastri next contended that the High Court should not have stated in the answer that "in determining the tax the profits should be apportioned as 75% for the manufacturing process and 25% for the selling process."

Facts :— That the High Court held, that profits were assessable in the year of account on the basis of accrual. While answering the question whether the profits or the amounts received by the assessee's Bankers in British India as price of goods sold by the assessee

against Railway Receipt in the name of the consignee as price of the goods delivered ex-godown in an Indian State was liable to tax under the Indian Income-tax Act, 1922; the High Court held, that the amount was taxable on the basis of accrual and not on the basis of receipt as decided by the Appellate Tribunal. Later on when the High Court wanted to bifurcate the profits, the Supreme Court held, that it was not in the jurisdiction of the High Court to determine and break up the profits because it could only be done by the Appellate Tribunal.

Case No 169**Jurisdiction & Cost****High Court's Jurisdiction to award cost in Reference.**

In C. I. T., Madras v. Kumbakonam Mutual Benefit Fund Ltd., Ref. 53 I.T.R., 241 at page 249; the Supreme Court has stated thus :

“A subsidiary point was raised by Mr. Sastri that the High Court had no jurisdiction to order the refund of the reference fees deposited by the assessee. This is true. But the High Courts can, if they so deem fit in a particular case, assess the costs in such a way as to include the sum of Rs. 100/- deposited as reference fee.”

Case No 170**Jurisdiction on Finding of Fact**

Where the Assessee Company claims that the Expenses incurred on Borrowing of money were Revenue Expenses and the High Court had Held, that they were Capital Expenses-The Supreme Court reversed the decision of the High Court—The High Court had no Jurisdiction to interfere with the Findings of Facts arrived at by the Tribunal.

In India Cements Ltd. v. C. I. T., Madras, Ref. 60 I. T. R., page 52.

Principle of Law (at page 64) :

Before we conclude, we must deal with the point raised by Mr. Sastri that the High Court erred in law in preferring the findings of the Income-tax Officer to that of the Appellate Tribunal. It is not necessary to decide this question but it seems to us that, in a reference, the High Court must accept the findings of fact made by the Appellate Tribunal and it is for the person who has applied for a reference to challenge those

findings first by an application under section 66(1). If he has failed to file an application under section 66(1) expressly raising the question about the validity of the findings of fact, he is not entitled to urge before the High Court that the findings are vitiated for one reason or the other.

Case No. 171

Jurisdiction on Finding of Fact

The High Court wrongly interfered with the Findings of the Appellate Tribunal which were Finding based upon Evidence.

The appeal of Commissioner of Income-tax succeeded in the Supreme Court. Payment to the employees of amounts higher than the salary was considered by the Appellate Tribunal to be unjustified. This was so stated by them in the statement of the case. When making a supplementary statement of the case; the Tribunal modified its original stand. The Supreme Court did not agree with that part of the supplementary statement as binding.

In commissioner of E.P.T., Madras v. N. M. Rayaloo Iyer & Sons. Ref. 41 I. T. R., page 671.

Facts :— (Facts may be seen in the Case No. 63 *supra*)

Principle of law is stated thus (*at page 685*) :

It is true that even if the assessee did not carry on the business through sub-distributors, payment made to its employees if reasonable and necessary having regard to the requirements of the business, may still be deductible but that in our judgment is a matter to be decided by the taxing authorities and not by us. The Tribunal had come to the conclusion that no payment in addition to the salary, annual bonus and special bonus was justified and any expression of opinion to the contrary in the supplementary statement pursuant to the order for statement of case could not in our judgment affect the conclusion originally recorded.

Case No. 172

Power to reframe the Question

In C. I. T., Madras, v. C. G. Krishnaswami Naidu, Ref. 51 I. T. R., page 876.

Facts :— The assessee had certain contracts in Mysore and he earned profit to a tune of Rs.1,24,000/-. He claimed that this income accrued in an Indian State so it was exempt under Section 14 (2) (c) of the Income-tax Act, 1922. The Appellate Tribunal decided the

point against the assessee but referred the following question to the High Court:-

“Whether the aforesaid commission of Rs.1,24,000/- referred to in paragraph 7 *supra* is income that accrued or arose to the assessee in British India within the meaning of Section 4 (I) (b) (i) of the Indian Income-tax Act ?”

The High Court, however, answered this question by holding that the income accrued in an Indian Estate and, therefore, was not taxable. The Supreme Court observed to say that the assessee would under this provision be entitled to exemption if it is found that the income arose in the State of Mysore. The High Court, no doubt, held, that the income so arose, but that was not the question which had been referred to it and admittedly it had no power to decide a question not referred to it.

Therefore the Supreme Court had to sent back this case to the High Court for re-examining the issue after reframing the question so as to bring out the real issue involved in this reference. The questions reframed was as under:-

1. “Whether the whole or any part of the assessee’s income of Rs. 1,24,000/- referred to in paragraph 7 of the Tribunal’s statement of case accrued or arose to the assessee in the State of Mysore (as it was before 1950) and exempt from tax for the assessment year 1946-47 under Section 14 (2) (c) of the Indian Income-tax Act, 1922 ?

2. If only part of such income accrued or arose to the assessee in the State of Mysore, what is the quantum thereof ?”

Case No. 173

Reference Application Contents

High Court’s Jurisdiction must adhere to the Findings of Fact by the Appellate Tribunal-It cannot sit in the Appraisal of the Evidence afresh-It is the Duty of the Assessee to challenge the Findings of Fact in a Reference Application otherwise the High Court is bound to adhere to the Tribunal’s findings unless there is no Evidence to support the findings arrived at by the Tribunal.

In C. I. T., West Bengal III v. Kamal Singh Rampuria, Ref. 71 I. T. R., Short Notes page 39.

Facts : The Tribunal came to the conclusion that the Return of the minor submitted by his father as guardian disclosing the income of the minor of the share in a firm was not complete. That the interest earned by the minor on an investment elsewhere was not disclosed in the Return and thus there was omission to disclose fully and truly all material facts. That the minor who had become major was liable to be reassessed under Section 34 (1) (a) of the Income-tax Act, 1922. Whereas the contention of the assessee was that the interest was disclosed in the father's own assessment because it was from out of the gift of money of Rs. 3 lakhs by the mother of the minor which interest the Department had already included in the father's case. That the point whether the interest should be included in the father's assessment or not was pending in the High Court in a reference. Subsequently the reference was decided by the High Court holding that interest was not to be included in the father's case. Accordingly the Tribunal held, that the reopening of the case of the minor inclusion of interest was justified. The High Court held, that there was no evidence to justify the action of the Department for reopening the case. That the Tribunal's findings were not warranted in the circumstances of the case and the answer was given in favour of the assessee. Reassessment notice was vacated.

But Supreme Court held, that in the absence of a proper question framed by the assessee challenging the validity of the findings of fact arrived at by the Tribunal, High Court's jurisdiction was limited to answer the reference by relying upon the findings of fact arrived at by the Appellate Tribunal. That the High Court cannot sit in the appraisal of the evidence afresh and reverse the findings of fact arrived at by the Tribunal unless there is no evidence to support the findings arrived at by the Tribunal. That it is the duty of the assessee to claim a question of law challenging the findings of fact in a reference application under Section 66 (1) of the Income-tax Act, 1922. That the answer given by the Calcutta High Court was thus an error. The Supreme Court allowed the Department's appeal.

Case No. 174

Same Business

Two Businesses whether Same Business-Findings of Facts by the Tribunal interfered by the High Court whether Justified.

In Hooghly Trust (Private) Ltd. v. C. I. T., West Bengal and Andaman & Nicobar Islands, Ref. 71 I. T. R., Short Notes page 21.

Facts :— There was a claim by the assessee that he was entitled to set off losses brought forward from the two preceding years in the profits in the disputed assessment years 1955-56 to 1957-58. The Income-tax Officer rejected the claim for carry forward of the loss on the ground that there were two separate businesses and cloth business seized to exist in the year of account. Appellate Assistant Commissioner confirmed the Income-tax Officer's findings by taking stock position and the Bank account which were separately operated. The Appellate Tribunal reversed the judgment of the Appellate Assistant Commissioner on the ground that the assessee was carrying on business in several commodities and cloth was one of them. That there was unity of control and expenses in the business which assessee carried on in the year of assessment as well as in the preceding years. Thirdly the Tribunal relied upon control on cloth which was introduced in 1946 as a result of which he became an approved buyer by the Government and there was change in the mode of business only. That cloth business was never distinct business from other businesses which the assessee had carried on. The High Court did not agree with the findings of the Appellate Tribunal but preferred the facts which were found by the Appellate Assistant Commissioner in his judgment and held that the assessee was not entitled to carry forward the losses of cloth business in subsequent years. The Supreme Court did not agree with the answer given by the High Court for the following reasons :—

“In the absence of a proper question about the validity of the findings of facts arrived at by the Tribunal, it was not open to the High Court to accept the findings of the Appellate Assistant Commissioner or to come to any independent conclusion itself on facts; that the conclusion arrived at by the Tribunal was correct.”

Case No. 175

Writ

Disposal in the High Court.

In Virudhunagar Steel Rolling Mills Ltd. v. Government of Madras, Ref. 70 I. T. R., page 726.

Where writ is disposed off in the High Court on merits by a speaking order though notice was not given to the opposite party to appear, such an order of the High Court will be considered to be disposal of the writ and would be resjudicata in as much as no appeal in the Supreme Court can lie on the same issue which was the subject matter of the writ. The only remedy is to appeal to the Supreme Court from such an order rather than go under article 32 of the Constitution.

Case No. 176

Writ Petition

Writ – High Court – Default of the Assessee in making the Payment of the Tax.

In Third Income-tax Officer, Mangalore v. M. Damodar Bhat, Ref. 71 I. T. R., page 806.

Where the assessee was held to be in default by the Income-tax Officer who proceeded to recover the tax from him under Section 226 (3) of the Income-tax Act, 1961. Writ was moved by the assessee in the High Court under article 226 of the Constitution. Nagpur High Court held, that it was necessary for the Income-tax Officer to give notice to the assessee first before holding that he was in default. Accordingly the High Court quashed recovery proceedings. In the Supreme Court reversing the decision of the Nagpur High Court:

Held, that there was nothing in the language of Section 226 (3) to suggest that the assessee would not be in default before a notice under that section was issued; that the notice of recovery was by the I. T. O. validly issued.

In the absence of specific particulars in the writ petition, it is not open to the High Court to go into the question whether the Income-tax Officer arbitrarily exercised his discretion under Section 226 (3) in treating the assessee as being in default.

Case No. 177

In 'V. D. M. RM. M. RM. Muthiah Chettiar v. G. I. T., Madras, Ref. 71 I. T. R., Short Notes page 41.'

Where the assessee had not disclosed in his Return the income of his wife or the minor child from the firm in which he was also

the partner, the Supreme Court reversed the judgment of the High Court of Madras and held that there was no omission on the part of the assessee to disclose fully and truly all material facts. The reasoning is that there is no column in the Return where the assessee should have disclosed that part of the income of his wife or the minor child from the same firm in which he was also a partner. So there was no duty upon the assessee to disclose this fact to the Department. Primary facts are those which are disclosed in the Return or statements annexed. Inference in law was the duty of the Revenue authorities.

Case No. 178 Writ & Non Performance of Duty by the I.T.O.

Where the I.T.O. does not perform his duty and make a correct calculation of tax due from assessee as a result of Tribunal's judgment; he fails to perform his duty. Writ was admitted by the Supreme Court against I. T. O.'s action. Commissioners' revisional order and High Court's refusal to grant writ to the assessee were set aside.

In Dwarka Nath v. I. T. O., Special Circle D-Ward, Kanpur & Another, Ref. 57 I. T. R., page 349.

Facts :— In this case some order was given by the Tribunal holding that the profits on sale was capital gains and not income. In the original assessment it was treated as income. The I. T. O. refused to obey the direction of the Tribunal and re-calculate the tax on the basis of capital gains. When fresh appeal against this order was filed before the A. A. C., it was held to be not maintainable. Against this, the assessee went to the Commissioner under Section 33A (2) of the Income Tax Act of 1922, he dismissed the petition of the assessee. When the case came before the High Court, the High Court dismissed the writ on the ground that the affidavit filed by the assessee was not clear on all the points and it was defective. Then the case came before the Supreme Court.

The Supreme Court allowed the writ in favour of the assessee : Directing the Income-tax Officer to pass order afresh, issue demand notice under Section 29 afresh on the basis of the capital gains tax.

Principle (at page 361) :

"Deponent's own knowledge" in rule 1 (2) of Chapter XXII of the Rules is wide enough to comprehend the knowledge of the appellant

derived from a perusal of the relevant documents; and the affidavit in express terms disclosed and specified the documents, the source of the appellant's knowledge. He swore in the affidavit that the documents annexed to the affidavit were true copies of public documents. If they are certified copies of public documents, they prove themselves; if they are originals of the orders sent to the appellant, the deponent, as his agent, speaks to their receipt. It is, therefore, not correct to say that the facts stated in the affidavit are not based on the deponent's knowledge. The other facts alleged in the affidavit are only introductory in nature and if they are excluded, the result will not be affected. That apart, if the affidavit was defective in any manner the High Court, instead of dismissing the petition in limine, should have given the appellant a reasonable opportunity to file a better affidavit complying with the provisions of rule 1 of Chapter XXII of the Rules.

Note :— Ultimately the Supreme Court said that the Commissioner should have decided judicially after giving opportunity of being heard, and therefore his order was liable to be set aside.

Case No. 179

Writ & Reference

There cannot be a Writ if there has been a Reference.

In Sixth Income-tax Officer, City Circle II, Bangalore v. K. T. Pillaiiah & Sons., Ref. 66 I. T. R., page 730.

Held, that where the assessee had obtained a reference on the question whether if a notice was issued under Section 34 of the Mysore Income-tax Act, 1923, within the prescribed period the Income-tax Officer could proceed to assess or reassess such escaped income after 4 years from the close of the assessment year, but the assessee did not press that question before the High Court. So the question must be deemed to have been answered against him and he could not thereafter re-agitate that question in a writ petition under article 226 of the Constitution.

Also held, that the question must have been deemed to be answered by the High Court when the reference was disposed off; So issue is also disposed off and the same question cannot be raised in writ again. The question of validity of notice under Section 34 and reasonableness of the grounds on which the Income-tax Officer

was of the opinion that income escaped assessment can no more be open to be decided in the writ petition.

Case No. 180**Writ Scope**

Facts in the Writ did not indicate any such Material which was relied on by the High Court in quashing the Notice under Section 34- The High Court travelled beyond its Jurisdiction in the Writ Petition.

In I. T. O., Alleppey v. S. Veeriah Reddiar, Ref. 64 I. T. R., page 70.

Question arose whether in the writ, the High Court had the power to quash the notice issued under Section 34A of the Income-tax Act for reopening a case of the assessee on the reason that some income escaped assessment. The High Court had taken into consideration some evidence and material which was not mentioned in the writ petition of the assessee and quashed the notice. The Supreme Court looked into the report of the I.T.O. submitted to the Commissioner before he issued notices for reassessment, and were satisfied that there were reasonable grounds for starting reassessment proceedings. The Supreme Court held that the High Court was in error in quashing the notice.

Principles of Law (at page 72) :

1. *The main point urged on behalf of the appellant in this appeal before us is that the High Court wrongly exercised its jurisdiction in quashing the notice issued by the appellant on a ground which was not raised by the respondent in his petition under article 226 of the Constitution. This submission has to be accepted. Learned counsel appearing for the respondent was unable to show any averments in the affidavit filed on behalf of the respondent where such a ground might have been raised. The respondent, in that affidavit, clearly understood that the notice issued by the appellant was under clause (a) of sub-section (1) of section 34 of the Act, and yet, confined the challenge to the ground that the appellant had no reasons whatever to believe that the income of the respondent had escaped assessment or had been under-assessed.*

(at page 72-73) :

2. *..... we called upon learned counsel for the appellant to produce before us copies of the relevant file of the appellant which led to*

the issue of the notice in question. We have seen the report submitted by the appellant to the Commissioner of Income-tax, and it appears to us that that report, taken together with his letter asking for approval of the Commissioner for issue of notice under section 34 (1) (a) which was accompanied by information in proforma "B" indicates that the appellant did have reasons to believe that the income of the respondent had been under-assessed because of reasons mentioned in section 34 (1) (a) of the Act. We are, thus, satisfied that the notice issued under section 34 (1) (a) was not at all invalid. We may also, in this connection, mention that the allegation of the respondent that the appellant had no reason to believe that the income of the respondent had escaped assessment or had been under-assessed was, in clear words, controverted, and even the High Court did not hold that this denial on behalf of the appellant was not correct.

Case No 181

Writ Scope

High Court refusing to entertain Writ where there was a Remedy under the Act—The Supreme Court does not interfere.

In Standard Mills Co. Ltd. v. M. Ramalingam & Another, Ref. 60 I. T. R., page 46.

Note :— Under Section 35 (10), the I.T.O. rectified the mistake and withdrew the rebate which he had allowed to the company in the assessment. There was no appeal against this order, and under the Act no remedy was sought by the assessee before the Commissioner under Section 33 (A) (2). He went in writ to the High Court. The High Court dismissed the writ. The Supreme Court said that the High Court was right because there was remedy under the Act which the assessee did not avail of.

New Point In High Court

High Court's power is limited in scope. It cannot admit new point of law which does not arise out of the order of the Appellate Tribunal. But if there is a question of law in reference and the High Court is of the opinion that facts in the statements of the case are insufficient. They may call for a supplementary statement. How it should be interpreted will be clear from the following cases :

Case No. 182

In New Jehangir Vakil Mills Ltd. v. C. I. T., Bombay North, Kutch and Saurashtra, Ref. 37 I. T. R., page 11.

Principle of Law is stated thus (at page 19) :

The scope and subject-matter of the reference under section 66 (2) therefore is co-extensive with that of the reference under section 66 (1) of the Act and the High Court has no power or jurisdiction under section 66 (2) to travel beyond the ambit of section 66 (1).

Facts :— That the question for the decision in this case was whether the sale proceeds had been received at Bhavnagar because the cheques, etc., were sent to Bhavnagar. The High Court held, that the mere receipt of cheques by post at Bhavnagar was not conclusive in the absence of a further finding whether the cheques were sent by post, by request, express or implied, of the assessee. In that case, the High Court asked for a supplementary statement of the case and also allowed additional evidence to be given :

Held, that section 66 (4) did not empower the High Court to direct additional evidence being taken and that addition and alterations mentioned in that sub-section related only to such facts as already formed part of the record but had not been included by the Appellate Tribunal in the statement of the case.

Case No. 183

The second case in which the High Court attempted to answer a new point is of '*Kusumben D. Mahadevia v. C. I. T., Bombay City*, Ref. 39 I. T. R., page 540'.

Facts :— In this case, the assessee received dividends out of the profits of a company which had accrued partly in British India and partly in Baroda State. The assessee did not bring the income into British India and claimed benefit of paragraph 4 of the Merged States (Taxation Concessions) Order. The Appellate Tribunal held that the income did not accrue to the assessee in Baroda State but did not decide the question whether she was entitled to the benefit of the Taxation Concessions Order. The High Court held that the Taxation Concessions Order did not apply to the assessee but did not decide the question as to whether the income had accrued to the assessee in Baroda State. Thus, the Appellate Tribunal raised one question and the High Court answered another.

Held, that the High Court had exceeded its jurisdiction in going out of the point raised by the Appellate Tribunal and decided a different point of law and that Section 66 of the Income-tax Act empowered the High Court to answer a question of law arising out of the order of the Appellate Tribunal and it did not confer any jurisdiction to decide a different question of law, not arising out of such order but it was possible that the same question of law may involve different aspects and the High Court could amplify the question to take in all the facts but the question must still be one arising out of the Appellate Tribunal's order which was before the Tribunal or was decided by it. It could not decide an entirely different question.

Principle of law (at page 544) :

Section 66 of the Income-tax Act which confers jurisdiction upon the High Court only permits a reference of a question of law arising out of the order of the Tribunal. It does not confer jurisdiction of the High Court

to decide a different question of law not arising out of such order. It is possible that the same question of law may involve different approaches for its solution, and the High Court may amplify the question to take in all the approaches. But the question must still be one which was before the Tribunal and was decided by it. It must not be an entirely different question which the Tribunal never considered.

Case No. 184

The third is a case of '*Zoraster & Co. v. C. I. T., Delhi, Ajmer, Rajasthan & Madhya Bharat, Ref. 40 I. T. R., page 552,*' in which the Supreme Court re-examined this legal issue with reference to earlier decision and made observation that supplementary statement could be called for.

Facts :— The assessee supplied to the Central Government f. o. r. Jaipur certain goods and payment was received by cheques which were also received at Jaipur. The assessee contended that the income was received at Jaipur outside the taxable territories. This contention was not accepted by the Income-tax Appellate Tribunal. The assessee then applied for reference to the High Court under Section 66 (I) of the Income-tax Act and a question of law was referred to the High Court. The High Court remanded the case to the Appellate Tribunal for a supplementary statement of case to find out whether cheques were sent to the assessee by post or by hand and what direction, if any, had been given by the assessee firm to the Government Department.

Held, that such a supplementary statement could be called for and in the absence of anything expressly stated in the order of the High Court to the contrary, it cannot be said that the direction given would include the admitting of any fresh evidence as that had been prohibited by the '*New Jehangir Vakil Mills case, Ref. 37 I.T.R., page 11.*'

Observations (at page 558) :

1. *It was also pointed out that the facts admitted and/or found by the Tribunal could alone be the foundation of the question of law which might be said to arise out of the Tribunal's order. The case thus set two limits to the jurisdiction of the High Court under section 66 (4), and they were that the advisory jurisdiction was confined (a) to*

the facts on the record and/or found by the Tribunal and (b) the question which would arise from the Tribunal's order.

(at page 559-60) :

2. *It follows from this that the enquiry in such cases must be to see whether the question decided by the Tribunal admits the consideration of the new point as an integral or even an incidental part thereto. Even so, the supplemental statement which the Tribunal is directed to submit must arise from the facts admitted and/or found by the Tribunal, and should not open the door to fresh evidence.*

(at page 560) :

3. *The question is wide enough to include the alternative line of approach that if there was a request, express or implied, to send the amount due under the bills by cheque, the post office would be the agent of the assessee, and the income was received in the taxable territory when the cheques were posted.*

(at page 561) :

4. *It would have been better if the High Court had given directions confined to the record of the case before the Tribunal; but, in the absence of anything expressly to the contrary, we cannot hold that the direction would lead inevitably to the admitting of fresh evidence. This, at least, now cannot be done, since, '(New) Jehangir Vakil Mill's case', Ref. 37 I. T. R., page 11, has prohibited the admission of fresh evidence. In our opinion, the present case does not fall within the rule in '(New) Jehangir Vakil Mill's case,' and is distinguishable.*

Case No. 185

The next case is of '*Petlad Turkey Red Dye Works Co. Ltd. v. C. I. T., Bombay North*, Ref. 48 I. T. R., page 92'.

This is an important case of the Supreme Court in which the High Court had asked the Tribunal to submit supplementary statement of the case by recording additional evidence. Assessee's contention before the Supreme Court was that such a direction by the High Court was unauthorised by law. If additional evidence was over looked, the High Court could not answer against the assessee. The Supreme Court exceeded to the submission of the assessee by making following observations:

Observations (at page 99) :

1. *If necessary facts which will lay the foundation of raising a question of law are not there then there is no basis for reference of that question to the High Court because only on the basis of facts found by the Tribunal or admitted before it can a question of law arise. Thus only on the basis of facts admitted or found on the record can a statement of case be submitted.*

2. *When the case stated comes to the High Court and the High Court finds it necessary to have a supplemental statement of the case in order to answer the question of law which is raised then it can direct such statement to be submitted with such additions and alterations as it may direct but the statement must necessarily be based on facts which are already on the record and the High Court cannot ask for additional facts to be brought in because these would not be in regard to a question which arises from the order of the Tribunal but would be a statement based on something which was not before the Appellate Tribunal when it passed its appellate order. Therefore, although the High Court has the power to direct a supplemental statement to be made it has no power to direct additional evidence being taken.*

(at page 101) :

3. *The supplemental statement of the case may contain alterations or additions as the High Court may direct but those facts must be already on the record as the High Court has no power to ask for additional evidence to be taken. Secondly, when the supplemental statement of the case is directed to be submitted it is not a judgment or a final order as understood in its strict legal and proper sense nor a judgment in the sense it is used in the Income tax Act, i. e., section 66 (5) or section 66 A (2), i. e., a judgment which sets out reasons for the opinion which the High Court gives on the question submitted to it.*

In this view of the matter we are of the opinion that the High Court had no jurisdiction to direct the Tribunal to submit a supplemental statement of the case after taking additional evidence.

Facts :— In this case, the assessee, a company in Berut, effected sales to merchants of British India. Out of 14 lacs turnovers, six lacs was considered by the Revenue Department, giving rise to profits in British India which was held to be taxable here. Similarly, nine lacs out of 19 lacs was considered to be sale to

merchants in British India giving rise to profits received in British India and thus taxable. Money was received from merchants through cheques and post in Berut. These cheques were redirected to people to whom the assessee company had to pay. The Tribunal held, that there was implied direction by the assessee for sending money through cheques and the post office was the agent of the assessee; so, in their opinion, the receipt of income was in British India. When the case came before the High Court under Sections 66 (1), they asked for a supplementary statement of the case and directed the Tribunal to record evidence whatever the parties may like to adduce regarding post office whether it was the agent of the assessee. The Appellate Tribunal resubmitted the case after recording evidence and the final judgment of the High Court was given against the assessee based upon the additional evidence. The Supreme Court did not agree with this procedure of the High Court and allowed the appeal of the assessee.

Case No. 186

Next is the case of '*Commissioner of Income-tax, Madras v. M. Ganapathi Mudalier*, Ref. 53 I. T. R., page 623.'

It has been held by the Supreme Court that the High Court should not direct the Appellate Tribunal to submit a supplemental statement by recording additional evidence :

Principle (at page 627) :

We may mention that a further statement of the case, with the directions reproduced above, was uncalled for. As held by this court in 'Petlad Turkey Red Dye Works Co. Ltd. v. Commissioner of Income-tax, Ref. 48 I.T.R., page 92,' the supplemental statement of the case may contain such alterations or additions as the High Court may direct but the statement must necessarily be based on facts which are already on the record. The High Court had no power to ask for additional evidence to be taken.

Facts :— From the facts of this case the question that was referred to the High Court was whether there was evidence for coming to the conclusion that the business income at Singapore was that of the assessee and that there was remittance which was made to British India which could be brought to assessment. The Tribunal did not accept the book entries as genuine. That with-holding of the books

for certain years, filing of the affidavit with wrong allegations and other circumstances surrounding the fixed deposit in the Bank and the purchase of properties by the assessee who was held to be a manager only were considered sufficient evidence for rejecting the explanation of the assessee that he was only an employee.

Held, that there was sufficient material before the Appellate Tribunal to come to the conclusion what was real income of the assessee and, therefore, the High Court could not interfere with the finding of facts based upon evidence. Commissioner's appeal in the Supreme Court, therefore, succeeded on the ground that asking of the supplemental statement was beyond High Court's jurisdiction.

Case No. 187

Rule for Guidance of the High Court in calling for the Supplementary Statement of the Case - Evidence and Additional Evidence at what stage.

The next is the case of '*Keshav Mills Co. Ltd. v. C. I. T., Bombay-North, Ahmedabad*, Ref. 56 I. T. R., page 365'.

Principles of law is stated thus (at page 381) :

1. *This scheme indicates that evidence has to be led primarily before the Income-tax Officer, though additional evidence may be led before the Appellate Assistant Commissioner or even before the Tribunal, subject to the provisions of section 31 (2) of the Act and rule 29 respectively, and that means that when the Tribunal has disposed of the matter and is preparing a statement of the case either under section 66 (1) or under section 66 (2), there is no scope for any further or additional evidence. When the matter goes to the High Court, it has to be dealt with on the evidence which has already been brought on the record. If the statement in the case does not refer to the relevant and material facts which are already on the record, the High Court may call for a supplementary statement under section 66 (4), but the power of the High Court under section 66 (4) can be exercised only in respect of material and evidence which has already been brought on the record.*

(at page 382) :

2. if a question of law is framed in general terms and in dealing with its several aspects fall to be considered, they have to be

considered by the High Court even though the Tribunal may not have considered them.

Facts :— (Please refer to the facts already stated in Case-No. 27 *supra*)

Arising out of the above case the third item of Rs. 6,71,735/- was not finalised by the High Court, Bombay. But the High Court asked the Tribunal to submit a supplementary statement of the case. Meanwhile, when the case came back to the High Court for decision, the Supreme Court had pronounced a judgment of '*C. I. T., v. Ogale Glass Works Ltd.*, refer Case No. 107' *supra*. Decision was to the effect that post office if it is the agent of the non resident posting of the cheque will become the place of receipt of income. Therefore, the High Court again remanded the case to the Tribunal for the second supplementary statement and directed :—

".....that the Tribunal will determine on the evidence led by both parties whether the sum in question was paid by various merchants by sending drafts, hundis or cheques by post and that if the Tribunal found that in some cases the amount was not sent by post, then the Tribunal should determine what amount was sent otherwise than by post and the Tribunal should then submit a supplementary statement of the case."

Now the High Court finally disposed of the case against the assessee Mr. Palkhivala appearing for the assessee's case in the Supreme Court argued that the principles of previous two judgments of the Supreme Court in '*New Jehangir Vakil Mills Ltd.*, refer Case No. 182 *supra*' and '*Petlad Turkey Red Dye Works*, refer Case No. 185 *supra*', have been violated in this case and the High Court has answered the question on additional evidence which they could not enter into.

Mr. Palkhivala's contention has been accepted by the Supreme Court on the following :

Principle of law (at page 383) :

It must be conceded that the view for which the learned Attorney-General contends is a reasonably possible view, though we must hasten to add that the view which has been taken by this court in its earlier decisions is also reasonable possible. The said earlier view has been followed by this court on several occasions and has regulated the procedure in

reference proceedings in the High Courts in this country ever since the decision of this court in the 'New Jehangir Mills case' was pronounced on May 12, 1959. Besides, it is somewhat remarkable that no reported decision has been cited before us where the question about the construction of section 66 (4) was considered and decided in favour of the Attorney-General's contention. Having carefully weighed the pros and cons of the controversy which have been pressed before us on the present occasion, we are not satisfied that a case has been made out to review and revise our decisions in the case of the New Jehangir Mills and the case of the Petlad Co. Ltd.. That is why we think that the contention raised by Mr. Palkhivala must be upheld. In the result, the order passed by the High Court is set aside and the matter is sent back to the High Court with a direction that the High Court should deal with it in the light of the two relevant decisions in the New Jehangir Mills and the Petlad Co. Ltd. .

Case No. 188

Assessee cannot go behind the Statement of the case or Supplementary Statement of the case which was on Agreed Statement—No Additional Evidence is Permissible in the High Court.

In C.I.T., Mysore v. Canara Bank Ltd., Ref. 63 I.T.R., page 328.

Principle of law is stated as under (at page 331-32) :

We did not, however, permit Mr. Hazarnavis to produce additional evidence in this court for controverting the findings of fact reached by the Appellate Tribunal. It is a matter of significance that the original statement of the case dated May 15, 1957, and the supplementary statement of the case dated August 14, 1959, were both agreed statements. Before the High Court also, the findings of the Appellate Tribunal were not challenged on behalf of the Commissioner of Income-tax. On the other hand, it appears that it was conceded by the appellant before the High Court that there was no evidence that the "blocked" balance was, in fact, employed by the Karachi branch for the internal banking operations in Pakistan or for its business in Pakistan and other foreign currencies. It is, therefore, not permissible for the appellant at this stage to go behind the two statements of the case and to challenge the findings of fact contained therein.

Facts :— That there was an excess of Rs. 1,70,000/- realised on the amount blocked in Pakistan till 1953. It could not be remitted to India due to permission of the State Bank of Pakistan being not available. This surplus was as a result of the difference in the exchange rate of the two countries. There is no evidence that there was any trading with this money in Pakistan by the assessee Bank.

Held, that the surplus was a capital receipt and not a trading receipt. The High Court also, relying upon the facts found by the Tribunal held, that it was not a trading receipt. When an attempt was made before the Supreme Court to bring additional evidence, the Supreme Court did not permit the counsel of the C. I. T. to argue contrary to the statement of the case already agreed upon.

Case No. 189

Rule for the Guidance of the Income-Tax Appellate Tribunal to frame Statement of the Case.

Statement of the case drawn by the Appellate Tribunal must contain every fact admitted or accepted by the I. T. O. or by the A. A. C. and by the Tribunal. The High Court should not be left to search facts.

In Dalhousie Investment Trust Co. Ltd. v. C. I. T. (Central), Calcutta, Ref. 66 I. T. R., page 473.

Principle of law is stated as under (at page 476) :

..... the mere fact that an investment company periodically varies its investment does not necessarily mean that the profits resulting from such variation is taxable under the Income-tax Act. Variation of its investments must amount to dealing in investments before such profits can be taxed as income under the Income-tax Act.

Facts :— That the assessee company was varying its investments from time to time. The Tribunal held, that the surplus realised on sale was the revenue receipt. The Supreme Court expressed a law point thus :

Principle (at page 477) :

..... that a statement of the case should contain all the facts, whether mentioned by the Income-tax Officer or the Appellate Assistant

Commissioner, which the Appellate Tribunal accepts and it should not be left to the High Court or the Supreme Court to discover whether all the findings of the Income-tax Officer and the Appellate Assistant Commissioner had been accepted by the Appellate Tribunal or not.

The case was remanded for re-hearing.

Case No 190

Additional Statement of the case is not Justified because it is beyond the Powers of the High Court to call for it if it is not asked for in an application under Section 66 (1) of the Income-tax Act 1922.

In Lakshmirattan Cotton Mills v. C.I.T. (U. P.), Ref. 70 I.T.R., Short Notes page 37.

Facts :— Two families came together as partners and were the managing agents of Lakshmirattan Cotton Mills (Appellant-company). Some disputes arose between the members of the family and award was given in 1943 settling the disputes. But not agreeing with the award, a civil case was lodged by one of the family members against others. This matter was settled in 1944 by amending the previous award of 1943. As a result of this amendment, 18 lacs was the amount payable to the ex-managing agents as compensation for premature termination of the managing agency. The appellant company paid the compensation and claimed a deduction of this amount. It was disallowed by the Appellate Tribunal for reasons given below :—

(a) That the services rendered by the members of the two families were in respect of the promotion of Cotton Mills and that there were no other services rendered by them.

(b) That payment of compensation was not in consideration of any services rendered so could not be allowed as a deduction in company's hand.

Questions before the Supreme Court were: (a) Whether the High Court was right in asking for the additional statement of fact ? (b) On whom did the burden lie for proving the admissibility of the expenditure in the hands of the company ? (c) Whether there was material for the finding arrived at by the Tribunal ?

Held, that the burden was upon the company to establish

from the facts that the money paid was in consideration of the services rendered and was revenue expenditure. That there was sufficient material before the Appellate Tribunal to come to the conclusion that payment was in consideration of the promotion of cotton mills and not for the services rendered. That additional statement could not be called for by the High Court on such questions as were not mentioned in the application for reference under Section 66 (1) of the Income-tax Act 1922. The High Court had no such power to decide academic questions or such other questions which they were not called upon to do so.

Case No. 191

In T. D. Kumar & Brothers (P.) Ltd. v. G. I. T., Calcutta, Ref. 63 I. T. R., page 67.

In this case, the assessee raised a new point of law in the High Court under Section 66 (2) of the Income-tax Act of 1922; that while claiming a deduction of loss against other incomes there was no concealment as the word 'loss' could not be equated with the word 'income'. So, no penalty could be imposed on the ground of concealment. This was a new point never raised before the Tribunal, so rejected.

Facts :-- In proceedings for the assessment year 1953-54, the company claimed that it suffered total loss of Rs. 76,241/- in the transactions of purchase and sale of shares. The I. T. O. disallowed the claim. Appellate Assistant Commissioner confirmed the above order of the I.T.O. . The Appellate Tribunal held, that transaction of purchase and sale of shares was not part of business of the company and so the loss was a capital loss. At the same time, the Tribunal did not decide other issues before them whether transactions were genuine or not. Subsequently the penalty was imposed by the Income Tax Officer on the grounds that the transactions were fictitious and there was a deliberate concealment of income by claiming false deduction of loss on sale of shares which was in fact a manipulation. So, the I. T. O. imposed penalty of Rs. 43,000/- . The A. A. C. confirmed the imposition of penalty. The Appellate Tribunal reduced the penalty to Rs. 25,000/- .

Held, by the Tribunal that it was a case of deliberate concealment. Two questions were raised but both were rejected on the

grounds that no question of law arose for reference. Before the High Court application under Section 66 (2) of the Income-tax Act, 1922, was rejected on the ground that no question of law arose from the order of the Appellate Tribunal. The counsel had set up the case before the High Court that "since the party had suffered a loss, it could not be said that this was a case of concealment of income. The word 'loss' cannot be equated with the word income." In appeal before the Supreme Court, the High Court's order was confirmed and assessee's appeal was dismissed.

Principles of law (at page 70-71) :

1. *This court has in Scindia Steam Navigation Company's case, Ref. 42 I.T.R., page 589, held that "it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order." In respect of the question which was not raised before the Tribunal, argued or decided by the Tribunal, a reference under section 66 (2) of the Indian Income-tax Act could not be asked for.*

2. *... that the Tribunal having decided the question against him, the assessee applied for reference of that very question. This court observed that if the question itself was in issue before the Tribunal, there is no further limitation that the reference must be limited to aspects of the question which had been argued before the Tribunal.*

The question on which a reference to the High Court was sought was a limited question and the Tribunal declined to refer the question because it did not arise out of its order, the question not having been raised before or decided by the Tribunal. The question sought to be raised before the High Court in a reference under Section 66 (2) was not an aspect of a question raised before the Tribunal : it was a new question which was never raised before the Tribunal. The High Court was, therefore, right in rejecting the prayer for an order under Section 66 (2) of the Act.

Case No. 192

New Line of Argument not covered by the Question of law referred by the Appellate Tribunal is not permitted.

In C. I. T., M. P., Nagpur & Bhandara v. Paluram Dhanania, Ref. 60 I. T. R., page 250.

Facts :— That assessee had conceded before the Appellate Tribunal that merger of State with Indian Union took place on January 1, 1948, whereas argument advanced by the additional Solicitor General in the Supreme Court was that the notification must be properly interpreted from which it will be established that the merger took place in the Indian Union on April 1, 1949. Commissioner's appeal was dismissed by the Supreme Court on the ground that new point not raised before the Tribunal and question not referred by the Tribunal cannot be argued in appeal before the Supreme Court.

Held, that the High Court was right in refusing the new line of argument not covered by the question of law referred by the Appellate Tribunal.

Case No. 193

New Arguments Advanced before the High Court not covered by the Question of law framed and not arising out of the order of the Tribunal is not permitted.

In B B. Iranee v. C. I. T., Bombay City II, Ref. 60 I. T. R., page 437.

Facts :— Mr. Iranee in 1941 came to India from Hong Kong where he was doing export and import business. In the year of assessment i. e. 1947-48 he was a resident and carrying on business at Bombay with manager at Hong Kong. In the assessment the Income-tax Officer included Rs. 1,00,000/- as income earned in Hong Kong. The assessee contended that it should be apportioned on time basis because he was not fully controlling the business of Hong Kong through out accounting year ending December, 1946. Also it claimed that losses suffered upto the year 1941 should be allowed as set off against this estimated income. Both these contentions were rejected by the Income-tax Officer, by the Appellate Assistant Commissioner and by the Tribunal.

A new contention was raised in the Supreme Court by Mr. Mehta, the counsel of the assessee, that losses of the years 1941 to 1945 were ascertained in the year 1946 and should be considered as losses suffered in the year 1946 and, therefore, should be allowed as a deduction in the assessment year 1947-48. This was a new

contention not covered by the question of law asked for by the High Court.

Held, that in the circumstances it was a new point which could not be permitted to be argued.

Principle of law (at page 441) :

On a direction issued by the High Court, the Tribunal referred the following question to the High Court :

“Whether, on the facts and in the circumstances of the case, the Tribunal erred in law or misdirected itself in rejecting the assessee’s claim to set off the alleged losses of 1941 of Hong Kong business against the income of the assessment year ?”

It will be noticed at once that the question does not relate to the losses incurred in the year 1946, but only those incurred in the year 1941. The question ex facie does not comprehend the losses incurred in 1946 or ascertained during that year. The High Court, therefore, rightly held that the question framed by it was confined to the losses of the year 1941. But on an assumption not warranted by the question, the learned judges of the High Court, in deference to the arguments advanced by the counsel appearing before them, proceeded to consider the argument now raised before us and came to the conclusion that the said losses could not be held to have been sustained in the year 1946. In our view, it was not open to the High Court to answer the question not referred to it by the Tribunal. The Tribunal’s order also shows that no such contention was raised before it; nor did the Tribunal deal with it. Though, in the application under section 66 (2) of the Act for directing the Tribunal to refer to the High Court questions of law, one of the questions referred to earlier losses ascertained in 1946 and though the facts to sustain the said question were narrated in the affidavit in support of the petition, the High Court did not direct the Tribunal to refer the said question, presumably because no such question arose on the order of the Tribunal. In the circumstances, we cannot permit the appellant to raise a question which is entirely different from the question propounded for the decision of the High Court.

Note :— This principle is different from those where the Supreme Court has said that a new line of argument can be admitted in answering the question of law arising out of the order of the Tribunal if it is covered by the broad question of law. For example; see : Raja Sharda Narain Singh’s case, refer Case No. 204 *infra*.

Case No 194

In Manji Dana v. C. I. T., Madhya Pradesh, Bhandara and Nagpur Ref. 60 I. T. R., page 582.

There is another case where a new point was sought to be raised by the assessee in the High Court which he had not raised before the Income-tax Officer or before the Appellate Assistant Commissioner or in the memorandum of Appeal submitted to the Appellate Tribunal. The Supreme Court on facts found that assessee has failed to establish his case that the re-opening of the case under Section 34 (1) (a) and making of additional assessment was in respect of the same income which had already been assessed in the status of H. U. F. .

Facts :— For the assessment year 1946-47 the appellant, Manji Dana, filed his Return of income in the status of an individual, but the Income-tax Officer assessed him in the status of a Hindu undivided family. An appeal against the order of assessment was dismissed. The Income-tax Officer thereafter having reason to believe that certain income had escaped assessment initiated action for assessment and served a notice upon Manji Dana (Individual) under Section 34 (1)(a) on March 25, 1955, for making an assessment of the escaped income. In response to the notice, Manji Dana filed his Return in the status of an individual, and the assessment was completed in the status of an individual on March 15, 1956. In appeal the order passed by the Income-tax Officer was confirmed by the Appellate Assistant Commissioner. Against that order an appeal was preferred to the Appellate Tribunal. Neither before he Appellate Assistant Commissioner, nor before the Tribunal, did Manji Dana set up a ground that, since the original order of assessment was made in the status of a Hindu undivided family, it was not competent for the Income-tax Officer, pursuant to a notice under Section 34 (1) (a) to assess him in the status of an individual. But in the course of the argument before the Tribunal, counsel for Manji Dana contended that the order of assessment pursuant to a notice under Section 34 (1)(a) made in the status of an individual was invalid, because the earlier order of the assessment was made against Manji Dana in the status of a Hindu undivided family. The Tribunal declined to allow this argument to be raised and dismissed the appeal.

Held, that reassessment was correctly made.

Principle (at page 585) :

There is no evidence on the record that the income which is assessed in proceedings under section 34 (1) (a) was not his separate income, and from the fact that the original order of assessment was made against Manji Dana in the status of a Hindu undivided family in the year of account, it cannot be presumed in proceedings for assessment under section 34 that the income assessed was not of an individual.

Case No. 195

Where certain documents were annexed with the application under Section 66 (1) of the Income-tax Act of 1922 which may or may not have been on the record or which were not mentioned in the Appellate Tribunal's judgment or statement of the case drawn by them, they should be ignored by the High Court in answering the reference.

In C. I. T., Delhi & Rajasthan v. Mewar Textile Mills Ltd., Ref. 60 I. T. R., page 169.

Question arose whether the sale proceeds in British India by the Mewar Textile Mills Ltd. collected through railway receipts in the name of the consignees and deposits made in the Bank were income accruing in British India or not ? The dispute was relating to a sum of Rs. 2,73,488/- in the assessment year 1943-44. The Supreme Court directed that the High Court should hear this reference afresh; but care should be taken that only six documents should be considered in deciding the reference which find place in the statement of the case or in the appellate judgment of the Tribunal. Jurisdiction of the High Court is advisory.

Observation (at page 172-73) :

Before we conclude we must mention a matter of procedure. The Appellate Tribunal at the instance of the assessee attached a number of documents to the statement of the case, including the six documents mentioned above, but we find no mention of these documents either in the appellate order of the Appellate Tribunal or in the body of the statement of the case. We feel that it is not consistent with the advisory jurisdiction of a High Court under the Act that the Appellate Tribunal should

attach to the statement of the case documents, other than the proceedings of the income-tax authorities, which are not mentioned and discussed either in its own appellate order or in the statement of the case. Suppose a dispute arises as to the interpretation of a document which is annexed in the manner above mentioned. If the High Court decides the dispute it would be deciding questions not decided by the Tribunal, and which the High Court would be incompetent to decide, under the Indian Income-tax Act.

Case No. 196

Supplemental Statement—High Court Directing to record Additional Evidence and resubmit the case for their decision is Unwarranted.

In C. I. T., West Bengal v. Premji Bhimji, Ref. 66 I. T. R., page 441.

Certain shares were sold by the assessee. The Department's contention was that it is an adventure in the nature of trade and profit was accordingly taxable. The assessee's contention was that it is capital realisation and not profit. The High Court ultimately answered the point in favour of the assessee. Special leave was not granted. The C.I.T. moved Supreme Court and the case came before the Supreme Court for final hearing. The Supreme Court directed the High Court to re-hear the case, because supplemental statement was without jurisdiction and they must decide upon the basis of the evidence already on record before the supplemental statement was drawn up.

Held, that the direction of the High Court to the Appellate Tribunal to draw up supplemental statement of the case after recording additional evidence on six points was without jurisdiction. The High Court had no powers to direct the recording of the additional evidence before submitting supplemental statement.

Case No. 197

Statement of the case drawn by the Appellate Tribunal whether binding in High Court – Whether Additional Evidence can be considered by the High Court not considered by the Appellate Tribunal in Appeal – Reference – Scope of.

In '*Associated Clothiers Ltd. v. C. I. T., Calcutta*, Ref. 63 I. T. R., page 224;' the following two law points have been stated by the Supreme Court :-

Principles of law (at page 227) :

1. *The High Court in a reference under section 66 (1) or (2) is bound to proceed on the findings recorded by the Income-tax Appellate Tribunal : it has no power to admit or record additional evidence, as the High Court did, and to consider that additional evidence which was not placed before the Tribunal. We must therefore proceed on the view that there is no evidence before the Tribunal and no finding of the Tribunal that after transferring its assets the appellant-company carried on business.*

2. *This court must accept the statement made by the Tribunal in the statement of the case, especially when no objection was raised thereto before the Tribunal or before the High Court on behalf of the appellant-company at any time.*

Facts :— The assessee company sold all of its assets to another limited company in consideration for partly cash and partly allotment of shares. The value of each was mentioned in the agreement executed between the two companies. The value of the building in the transfer deed was more than the written down value in the assessee's records. This excess was brought to tax by the Revenue authorities as profits on sale of depreciable asset under Section 10 (2)(vii) of the Income-tax Act of 1922.

Held, that this was rightly assessed as profits taxable. The High Court was in error in taking into consideration other materials and other evidence which were not considered by the Appellate Tribunal who had held the excess to be taxable.

(Kindly refer to facts in CaseNo. 51.)

Case No. 198

Where the High Court does not call for the supplementary statement of the case and rather gives a direction to the Tribunal to dispose of questions of law, the High Court is not doing its duty in conformity with law.

In Rajkumar Mills Ltd. v. C. I. T., Bombay, Ref. 28 I. T. R., page 184.

Facts :— That company was non-resident company of Indore. It supplied goods f. o. r. Indore to Government of India and also through the representatives to secure the orders and supplied goods from Indore to the merchants. The Revenue authorities treated the place of accrual of profit to be British India and not Indore. Some modification was made by the Tribunal but the case was referred to the High Court for its opinion on two questions namely: Whether the profit accrued in British India on sale to Government and sale to merchants? The High Court directed the Tribunal to consider certain correspondence, contract and other circumstances and decide the appeal according to the direction given in the High-Court's judgment. It did not ask for a supplementary statement of the case. When the appeal came before the Supreme Court, the Attorney General appearing for the Government conceded that he could not support the High Court's order because they had given a direction to the Tribunal to dispose a question of law on High Court re-hearing of the appeal should have asked for the supplementary statement of the case.

Held, the question whether the contracts for sale were entered in British India or at Indore was not a question of fact to be determined by the Tribunal. It was a question of law to be determined by the High Court on a true construction of the correspondence, documents and the conduct of the parties. Their duty was to ask for the supplementary statement of the case and decide the question of law themselves.

Case No. 198-A

Where a question of law is not referred by the Tribunal and the Commissioner does not move an application in the High Court for that question being referred by the Tribunal in a supplementary statement of the case; such a question though arising out of the order of the Tribunal cannot be answered by the High Court or by the Supreme Court. The jurisdiction of the Supreme Court is no higher than that of the High Court because it is purely advisory

In C. I. T., Andhra Pradesh v. Krishna & Sons., Ref. 70 I.T.R., page 733.

Facts :— An omnibus to the assessee costed Rs. 14,500/- .

After 6 years written down value of this was zero. The assessee sold this omnibus with a right to ply for a sum of Rs. 23,000/- . The Appellate Tribunal held that Rs. 6,000/- was the income arising on a sale of asset under Section 10 (2) (vii) of the Income-tax Act, 1922. Tribunal also held, that difference between Rs. 23,000/- and Rs. 14,500/- i. e. Rs. 8,500/- was the capital gains taxable under Section 12B of the Income-tax Act. The Commissioner wanted that difference between Rs. 6,000/- and Rs. 23,000/- i. e. Rs. 17,000/- should be treated as capital gains. But no such question was drawn by the Appellate Tribunal for answer by the High Court. Nor any such attempt was made by the Commissioner in the High Court asking the Tribunal to refer the question of law whether whole of this was capital gains.

Held, (i) that answer given by the High Court on a question already referred by the Tribunal was correct and no further decision was necessary in a reference case where question of law is not referred.

(ii) that the question referred by the Tribunal did not comprehend an enquiry into the contention raised before the Supreme Court. The High Court had accepted the finding of the Tribunal and the Supreme Court could not record an opinion on a question which was not referred by the Tribunal. On the findings of the Tribunal that the omnibus was sold at Rs. 6,000/- and that the right to ply the omnibus under the permit was not an asset, no question of charging to tax any capital gains earned by sale of the omnibus fell to be determined.

(iii) That, however, having accepted liability to pay tax on Rs. 8,500/- the respondents could not obtain the benefit of the opinion of the Supreme Court contrary to the finding of the Tribunal and confirmed by the High Court.

New Plea Raised in High Court

That in reference the High Court can call for supplementary statement of the case to decide the question of law before them. But they cannot call for additional evidence or any other question of law on a new point which is not referred to them for answer and which does not arise out of the order of the Appellate Tribunal. This has been discussed in the previous chapter.

That, however, the High Court can permit the parties to advance new arguments if the question referred is broad enough to cover a new matter not hitherto argued. The condition precedent is that no new evidence will be considered and the point must arise out of the order of the Appellate Tribunal. On this aspect some cases are discussed hereunder :

Case No. 199

The leading case on this subject is '*C. I. T., Bombay v. Scindia Steam Navigation Co. Ltd.*, Ref. 42 I. T. R., page 589.'

Facts :— The respondents were the owners of a steamship called "El Madina". That was requisitioned by the Government during the last world war, and was lost by enemy action on March 16, 1944. As a compensation, the Government paid the respondents Rs. 20,00,000/- on July 17, 1944, Rs. 23,00,000/- on December 22, 1944, and Rs. 33,333/- on August 10, 1946. The original cost of the ship was Rs. 24,95,016/- and its written down value at the

commencement of the year of account was Rs. 15,68,484/- . The difference between the cost price and the written-down value which came to Rs. 9,26,532/- , represents the depreciation already allowed. As the total compensation received exceeded the cost price, the respondents have recouped themselves all the amounts deducted for depreciation.

On these facts the assessee contended that Rs. 9,26, 532/- though in excess of the written down value could not be assessed as income under Section 10 (2) (vii) of the Income-tax Act of 1922 for the assessment year 1946—47. It relied upon the concession given by the C.B.R. for the E.P.T. assessment purposes allowing exemption. The Tribunal repelled the contention on the ground that concession was only for the E. P. T. assessments. The statutory provision of the Income-tax Act must be interpreted by ignoring the C. B. R. instructions. They accordingly held, that for assessment year 1946-47 that Rs. 9,26,532/- was taxable because proviso to Section 10 (2) (vii) says that amount received in excess of the written-down value of an asset upto the extent of its original cost is taxable as profits.

Further when referring the case to the High Court the question of law was in the following terms :

“Whether the sum of Rs. 9,26,532/- was properly included in the assessee company's total income computed for the assessment year 1946--47 ?”

When this question of law was argued in the High Court, the assessee raised a new point for the first time that proviso to Section 10 (2) (vii) was introduced in May, 1946, and, therefore, it cannot effect the case of the assessee which is governed by the Finance Act of 1946 which came into force on 1st. April, 1946. Proviso could not be given the retrospective effect. The High Court held, that the contention of the assessee was correct and this Rs. 9,26,532/- and odd could not be assessed as income because the introduction of this proviso was after 1st. April, 1946, and, therefore, could not govern the assessment of the assessee for the assessment year 1946-47. The Department's contention was that this is a new point, never raised hitherto before the Appellate Tribunal nor before the Revenue-authorities by the assessee. The High Court answered the point by saying that though a new line of argument yet it is covered by the

broad question of law referred by the Appellate Tribunal. Question before the Supreme Court was as to what the questions of law are that can be raised and whether the new question of law or new line of argument could be raised which is covered by question of law already referred.

Held, on these facts, new line of argument was allowed to be raised for the first time and assessee was again successful in the Supreme Court. The result of the above discussion may thus be summed up :

Principles (at page 611) :

1. *When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.*

2. *When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.*

3. *When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.*

4. *When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.*

“Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order.

In this view, we have next to consider whether the question which was raised before the High Court was one which arose out of the order of the Tribunal, as interpreted above. Now the only question on which the parties were at issue before the Income-tax authorities was whether the sum of Rs. 9,26,532/-, was assessable to tax as income received during the year of account 1945-46. That having been decided against the respondents, the Tribunal referred on their application under Section 66 (1), the question, whether the sum of Rs. 9,26,532/- was properly included in the assessee company's total income for the assessment year 1946-47, and that was the very question which was argued and decided by the High Court. Thus it cannot be said that the respondents had raised any new question before the Court.”

That Hon'ble Justice Shah agreed with the contention of the assessee that the High Court was correct in permitting a new line of argument. Answer by the High Court was also correct. He approved the view expressed by the Chief Justice Chagla in '*Madan Lal Dharnidharka v. C. I. T.*'.

The passage is extracted as under (*at page 618*) :

"On the other hand is the view expressed by Chagla, C. J., in '*Madan Lal Dharnidharka v. Commissioner of Income-tax, Ref. 16 I. T. R., 227 at page 233*' where the learned Chief Justice observed his conclusion as follows :

Observation :

I should have stated that a question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal and which were stated in the order. I see no reason to confine the jurisdiction of this court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The section does not say so and there is no reason why we should construe the expression 'arising out of such order' in a manner unwarranted by the ordinary grammatical construction of that expression.

For the reasons already set out, in my view, the interpretation placed by Chagla, C. J., on the expression 'arising out of such order' is the correct one."

Case No. 200

In Madan Lal Dharnidharka v. C.I.T., Ref. 16 I. T. R., page 227.

Facts :— That the assessee was residing in British India in the year of account which is disputed. He made two cash credits amounting to Rs. 51,000/- and Rs. 1,50,000/-. Both the amounts were assessed as income from undisclosed source. The assessee contended that they were inheritance of wealth left by his elders. That he had a branch business in Indore in which he had suffered heavy losses. In the alternative, his case was that against the amount of Rs. 2,01,000/- to be included in the assessment, he should be given a set off of losses suffered by him in Indore. The Revenue authorities and the Appellate Tribunal rejected the

contention of the assessee on both the issues. The question of law referred to the Bombay High Court, however, decided, that jurisdiction of the High Court is advisory and any question of law referred by the Tribunal arising out of the order of the Tribunal must be answered by the High Court under Section 66 (5) of the Income-tax Act of 1922.

The points which were raised in the Grounds of Appeal were not fully dealt with by the Appellate Tribunal in its order. The view expressed by the High Court is that the question can be canvassed in the High Court.

Case No. 201

Another decision of the Supreme Court on this issue is in '*C. I. T., Bombay South, Bombay v Ogale Glass Works Ltd, Ref 25 I. T. R., page 529.*'

Facts :— Facts are discussed *supra* Case No. 107.

Commissioner's contention was that a new line of argument should be permitted as the broad question referred for the answer does admit of the new arguments that can be advanced. New line of argument was allowed to be raised by the Commissioner of Income-tax.

Principle of law is stated thus (at page 541) :

Here no new question of law is sought to be raised. The question of law still is, whether on the facts of this case, income, profits and gains in respect of sales made to the Government of India was received in British India within the meaning of Section 4 (1) (a) of the Act. The argument is that as the cheques were posted at Delhi at the request of the assessee payment was received by it in British India. It is said that although the language in which the question has been framed is wide enough to include this branch of the argument, the question should, nevertheless, be read as circumscribed by the facts on which the Tribunal's decision was made and should not be regarded as at large. This suggestion means that the question must be read as limited only to those facts on which alone reliance was placed in support of the argument actually advanced before the Tribunal and on which the Tribunal's decision was founded, leaving out all other facts appearing on the record and even referred to in the Tribunal's order and the statements of the case. There

is no warrant for such suggestion. The language of the question clearly indicates that the question of law has to be determined "on the facts of this case". To accede to the contention of the assessee, will involve the undue cutting down of the scope of the question by altering its language. Seeing that the High Court permitted this argument to be advanced before them we are not prepared to shut it out.

Case No 202

New line of Argument permitted in the High Court

The next case is of '*Indore Malwa United Mills Ltd. v. C. I. T., (Central), Bombay, Ref. 59 I. T. R., page 738.*'

Principle of law (at page 742 - 43) :

Where, as in this case, the question of law in issue between the parties and referred to the High Court is the broad question whether or not the assessee is liable to pay tax on the ground that the sale proceeds including the profits of the sale were received by the assessee in British-India, the Revenue authorities may be permitted to argue for the first time at the hearing of the reference that, on the facts found by the Tribunal, the post office was the agent of the assessee for the purpose of receiving the cheques representing the sale proceeds and the assessee received the sale proceeds in British India where the cheques were posted, though this aspect of the question was not argued before the Tribunal and though the only point there argued was that the sale proceeds were received at Bombay where the cheques were encashed: see '*Commissioner of Income-tax v. Ogale Glass Works Ltd., Ref. 25 I.T.R., page 529*' and '*Zoraster & Co. v. Commissioner of Income tax, Ref. 40 I.T.R., page 552*;' see also '*Commissioner of Income-tax v. Scindia Steam Navigation Co. Ltd., Ref. 42 I.T.R., page 589.*' The decision in '*New Jehangir Vakil Mills Ltd v. Commissioner of Income-tax Ref. 37 I. T. R., page 11,*' relied on by the assessee is distinguishable. There, the question of law referred to the High Court was "whether the receipt of the cheques at Bhavnagar amounted to receipt of sale proceeds in Bhavnagar ?", and this question was not broad enough to cover the enquiry whether there were postings of the cheques at the request of the assessee and receipts of the cheques by the assessee through the post office in British India. The precise point decided by this court in the '*New Jehangir Vakil Mills case*' was that the High Court has no jurisdiction under section 66 (4) to direct the Tribunal to collect evidence not already

on the record and to make it a part of a supplementary statement of case, and this decision was followed and affirmed recently in 'Keshav Mills Co. Ltd. v. Commissioner of Income-tax, Ref. 56 I. T. R., page 365.' But, in the instant case, the High Court did not call for any supplementary statement of case. Nor is the question of law referred in this case a narrow one as in the 'New Jehangir Vakil Mills case' so as to exclude consideration of the contention that the assessee received the sale proceeds through its agent, the post office in British India. We are, therefore, satisfied that the Revenue authorities can raise this contention for the first time in the High Court.

Facts :— Which give rise to the above principle, that Indore (Indian State) was the place of supply of goods to the Government of India. Money was received through cheque given to the Reserve Bank, Bombay which accepted the same as agent for Indore party. The point argued before the Tribunal was regarding implied contract, only the new point that post office was the agent was raised for the first time in the High Court and was permitted.

Case No. 203

New Arguments raised before the Supreme Court—Not raised before the High Court covered by the Question of law—The Supreme Court remands the case.

The next case on this subject is that of '*Bhanji Bagawandas v. C. I. T., Madras, Ref. 67 I. T. R., page 18*'.

Facts :— That cash deposit in November, 1947, was added in the assessment year 1949-50 by taking book year as the previous-year. That because the financial year is the previous year for undisclosed source, the amount was deleted from the assessment year 1949-50 as it would fall to be assessed in the assessment year 1948-49. So, as a result of the judgment of the A. A. C. deleting the income from the assessment year 1949-50, it was considered that there was finding in consequence of which reassessment proceedings could be started for the year 1948-49. That amount was accordingly taxed. In the High Court of Madras, it was held, that proceedings under Section 34 of the Income-tax Act 1922, were validly started as there was no limitation for such an action under Section 34 (3) proviso of the Act of 1922. When the case came

before the Supreme Court, it was held, that each assessment is a unit of assessment and a finding given in the year 1949-50 would not permit the Department to invoke action for the year 1948-49. '*I. T. O., A-Ward Sitapur v. Murlidhar Bhagwan Das*, Ref. 52 I. T. R., page 335,' was followed.

But, a new line of argument was advanced by the counsel of the Commissioner that in view of the amendment of Section 34 clause 4 in the year 1959, the word 'any time' is wide enough to cover cases by reopening assessment beyond the period of eight years. This line of argument was never addressed before the Appellate Tribunal nor before the High Court.

Question was whether Commissioner could be permitted to argue the case by setting up a new line of argument.

Held, that since the question referred was broad and the new line of argument was just another aspect of the same matter, it could be argued.

The case was sent back to the High Court for hearing the parties on this new line of argument.

Principle (at page 22) :

.. . . . , but it is not a separate question by itself and is only an aspect of the question of limitation which has already been referred by the Appellate Tribunal to the High Court.

Note :— Amendment of 1959 introducing clause 4 under Section 34 of the Income-tax Act and using the word 'any time' has created doubts as to the meaning of the word 'any time' whether it would have the effect of increasing the limitation for which eight years are fixed, is yet to be decided.

Case No. 204

New line—Previous year—Whether Book year or Financial year for Cash Deposit — Question arises out of the Order of the Appellate Tribunal even though not Argued can be canvassed in the High Court in Reference.

The last case on this subject is that of '*Raja Sharda Narain Singh v. C.I.T., U.P.*, Ref. 68 I.T.R., page 209,' it has been stated by the Supreme Court that, where arising out of the order of the Appellate-

Tribunal, question of law is patently clear from the order it should be referred to the High Court for decision, if a broad question was mentioned in the application under Section 66 (1) of the Income-tax Act of 1922. This judgment adopts the earlier view expressed in the case of '*Scindia Steam Navigation Co.*' See Case No. 199 *supra* and '*Indore Malwa United Mills Ltd.*' See Case No. 202 *supra*.

Facts :— There was a cash deposit of Rs. 2 lacs on 3rd November, 1947, and the assessee maintained his accounts by the year 1st. October, 1947 to 30th September, 1948. This cash deposit was assessed by taking the book year as the previous year in the assessment of 1949-50. The Appellate Tribunal held in the order that the previous year for cash deposit would also be the book year. The ground was raised that the amount does not fall to be assessed in the year 1949-50. The High Court said that, since this question of law was not argued before the Tribunal as to what should be the previous year for cash deposit, it cannot be raised in reference. The Supreme Court reversed the judgment of the High Court on the ground that when a broad question of law is claimed arising out of the Tribunal's order, new aspect can always be permitted and allowed to be raised.

In the above case, the assessee had claimed a question of law to be framed for reference relating to the assessment year in which amount should be assessed and this point was dealt with by the Tribunal in the following terms :

Having held, that the sum of Rs. 2 lakhs was the revenue-income of the assessee, we have to consider whether it was the revenue income of the year under consideration. On that point too, there can hardly be any doubt that the sum represented the revenue income of the year under consideration. The accounting year of the assessee started from 28th of September, 1947, and extended upto the 30th of September, 1948. The deposit appears on the 3rd of November, 1947. The assessee is a man of great status. He is the Raja of an estate and owns considerable income from Zamindari, sayar, money lending etc. . He has been assessed in the past on considerably large amounts and his potential capacity to earn income is certainly great. The deposit appears in the account books of the assessee during the accounting period. The explana-

tion offered by the assessee has already been rejected by us. The amount is undoubtedly big but the assessee with his potential capacity to earn income could not have found it difficult to earn a sum of Rs. 2 lakhs from sources known to him but undisclosed to the Department. On these facts, the only inference that can be drawn is that the sum of Rs. 2 lakhs represents not only the income of the assessee but also the income of the previous year under consideration. The Appellate Assistant Commissioner had obviously erred in deleting this amount from the total computation of the assessee's income.

Though previous year for the cash deposit should be the financial year and amount should go back in the assessment of the year 1948-49; this specific question as such was not exactly argued before the Tribunal, yet the case succeeded before the Supreme-Court which drew the question of law in the following terms :—

“Whether the sum of rupees two lakhs included in the total income of the assessee as income from some undisclosed source was not assessable in the assessment year 1949-50 on the basis of the accounting year of the assessee from 1st. October, 1947, to 30th September, 1948, but was assessable only in the assessment year 1948-49 with reference to the financial year 1st. April, 1947, to 31st. March, 1948 ?”

Note :— It will, thus, be seen that where a new legal point can be argued arising out of the order of the Appellate Tribunal and a broad question of law was claimed to be referred, there will be no difficulty in new line of argument being admitted.

Whether Finding was a Pure Finding of Fact ?

1. Where the finding of the Tribunal is arrived at by considering solid material on record and the other evidence; the mere fact that they have also conjectured in their judgment at some places will not convert it into a question of law. See Case No. 90 *supra*.

2. Where a drafts man of the partnership deed makes statement which goes against the assessee and opportunity to cross-examine him was not availed of, the inclusion of the profits of the firm in his assessment on the ground of benami ownership is a finding of fact. See Case No. 150 *supra*.

1.

Case No. 205

Artificial Transaction

In Sohan Pathak and Sons. v. C. I. T., U. P., Ref. 24 I. T. R., page 395.

Facts :— That the assessee made claim for partition and conversion of business into partnership. There was a provision in the E. P. T. Act that if transactions were artificial whereby incidence of tax was likely to be reduced, it can be counter acted by the Revenue authorities by ignoring the effect of the transaction. Revenue authorities found that partition was effected with a view to evade payment of the E. P. T. and the transaction was artificial. They created the charge under the E. P. T. Act on this transaction. The Appellate Tribunal found that since the H.U.F. had no income in a particular chargeable accounting year, it could not be assessed

and the nature of transaction to be effected must be in relation to the existing business. But since there was discontinuance of the H. U. F.'s business, no order could be made on the basis of transaction being artificial.

Held, that the question of discontinuance of business of the H. U. F. and non-existence of the business in any accounting year was pure finding of fact.

Case No. 206 Bad Debt & Good Debt merged in one Account.

In Bank of Bihar Ltd., Patna v. C. I. T., Bihar & Orissa, Ref. 45 I. T. R., page 427.

Facts :— The assessee filed an appeal in the Supreme Court against the judgment of Patna High Court, and the appeal was unsuccessful. In this case, it was found as fact that, if a debt has become bad, subsequent amalgamation of that debt with other debts due from the same debtor which had not become bad, could not extend the period of the time barred bad debt so as to enable the creditor to write it off as a bad debt in a later year.

Principle (at page 429) :

The question whether a debt is a bad debt is one of fact, and if there is some evidence to justify the conclusion, it is not open to the High-Court in a reference under section 66 of the Indian Income-tax Act to re-appreciate the evidence.

Case No. 207

In Chhabildas Tribhuvandas Shah & Others v.C.I.T., West Bengal., Ref. 59 I. T. R., page 733.

Where the assessee's account disclosed lower profits as compared to preceding years and the stock account was also missing, the account books were rejected.

Held, that no question of law arose because it was a finding of fact.

Case No. 208

Share Dealing Business

Material was sufficient for holding that it was Share Dealing Business – No Resjudicata and no Question of law.

In Raja Bahadur Visheshwara Singh (Deceased) & Others v. C.I.T., Bihar & Orissa, Ref. 41 I.T.R., page 685.

Facts :— That the Zamindar had made an investment of Rs. 14 92 lacs in purchasing the shares. Some years later, he made borrowing of Rs. 10 lacs and that too was invested by him in purchasing the shares. Between 1936 and 1940, there were transactions of sale resulting in profits which were not taxed by the Department. But, for subsequent years there were other sale transactions which resulted in huge profits in lacs each year. The Department held him to be a dealer in shares and profits were taxed as business profits. The Appellate Tribunal confirmed the assessment on these transactions.

Question was whether it was a share – dealing business ? Whether the finding of the Appellate Tribunal gave rise to a question of law ?

Held, that there was sufficient material before the Appellate Tribunal to come to the conclusion that it was share dealing business resulting in taxable profits, even if in the past, he was not assessed on profits of sale of shares, it was immaterial. The fact that there were series of transactions with big magnitude of business, entries in the account books, money borrowed and certain other materials which were collected by the Revenue authorities, the conclusion arrived at by the Tribunal was a pure finding of fact.

Case No. 209

Transaction of inflation of Purchase

Again it may be submitted that leading case on the subject is '*Sree Meenakshi Mills Ltd. v. C.I.T., Madras*,' see Case No. 133 *supra*.

Where there is evidence to show that there were transactions effected by the assessee which, when examined with reference to other connected evidence, indicated that there was inflation in purchase price or suppression in sale price, book profit if disturbed would be a pure finding of fact.

2.

Case No. 210

According to Law

Question of law—Value of goodwill is a question of Law.

Refer Case No. 92 *supra*

Case No. 211**Adventure in the Nature of Trade**

On adventure in the nature of trade it has been held, that questions are not pure questions of fact.

In G. Venkataswami Naidu & Co. v. C. I. T. Ref. Case No. 134 *supra* and *Janki Ram Bahadur Ram v. C. I. T.*, Ref. Case No. 54-A & 136 *supra*.

Case No. 212**Agreement**

Question of Law-Employment - Services Termination - Agreement Interpretation.

In C. I. T., Bombay City-1 v. S. P. Jain, Ref. 44 I. T. R., page 535.

Facts :— That a contract of service as an employee for a fixed period of years contained a provision that if the services of the employee were terminated before the termination of the period, the employee would be entitled to compensation calculated at a certain amount "for each unexpired year of the duration of his employment". His services were terminated before the expiry of the period and he was paid a sum of Rs. 7 lakhs as "compensation for the cessation of employment".

Held, that interpretation of the terms of agreement and the nature of payment in law whether was taxable or not is a question of law.

Case No. 213**Bonus & Salary Payment**

Question of law does arise - Tribunal's order based on Suspicion - Bonus and Salary to Employee cut down.

In C. I. T., Kerala, v. C. D. Lonoppan, Ref. 60 I.T.R., page 247.

Facts :— That on suspicion alone, the salary or bonus paid to the employees was cut by the Revenue authorities and the High Court had answered the question in favour of the assessee on the ground that the Tribunal's decision was not based upon any evidence. The Commissioner took the matter to the Supreme Court.

Held, the Tribunal's order cannot be supported on merits. The High Court was correct in answering the question and following is the principle of law stated in this case :

Principle (at page 249) :

It will, therefore, be seen that the High Court answered the reference, as in the view expressed by it a question of law arose for its consideration. Therefore no question of want of jurisdiction arises in this case. The argument of the learned counsel, in substance, was not that the question referred to and answered by the High Court did not raise a question of law, but that the circumstances mentioned by the High Court were also taken into consideration by the Tribunal.

A perusal of the order of the Tribunal does not justify that contention.

Apart from the merits of the case, we do not think that this is a fit case for interference in exercise of our extraordinary jurisdiction under article 136 of the Constitution. The amount involved in the appeal was a few thousand rupees; and no important question of law arises for our decision. The scope of clauses (1) and (2) of section 66 of the Income-tax Act has been laid down by authoritative decisions of this court more than once.

Case No. 214**Depreciation**

Question of law does arise – Whether Depreciation recovered on Transfer of Assets to a Limited Company.

In Maharajadhiraja Sir Kameshwar Singh v. C. I T., Bihar & Orissa, Ref. 36 I. T. R., page 246.

Facts :— That the assessee who was a proprietor of a business on a particular date converted the same into a Private Limited Company. Share-holding was his own in the said Limited Company. The depreciable assets before the date of transfer according to written down value showed a figure of Rs. 1,30,785/- but when transferred to the Limited Company, they were sold for the price of Rs. 2,06,343/-. The difference was brought to tax as income in the hands of the transferer.

Question was whether it was a finding of fact or a question of law arising from the judgment of the Tribunal.

Held, that the assessee's claim was perfectly right when he claimed that the amount was not taxable. Whether it was so is a question of law.

Case No. 215**Income**

Whether Income Accrues in the Account year is a Question of law.

In C. I. T., Punjab v. Jai Parkash Om Parkash Company Ltd., Ref 52 I. T. R., page 23.

Facts :— (For Facts see Case No. 3)

Held, that the question whether, on the facts as ascertained, certain income could be said to have accrued to the assessee in a particular accounting year, was a question of law and that, therefore, the question raised by the Commissioner ought to have been referred.

Case No. 216**Judicial Pronouncement**

It is a piece of Information for re-opening a case.

In Commissioner of Wealth Tax, West Bengal v. Imperial Tobacco Co. of India Ltd., Ref. 61 I. T. R., page 461.

Facts :— In two wealth-tax assessments under the Wealth-tax Act, certain contingencies were given a deduction. In the third year, the Wealth-tax Officer came to the different decision. He disallowed the contingencies amount which in his opinion were not valid deductions. He also re-opened the cases of the two earlier years under Sec. 17 (b) of the Wealth-tax Act corresponding to Section 34 (1) (b) of the Income-tax Act, 1922. He made re-assessments and disallowed the deductions already given in the first assessments.

In appeal before the Appellate Tribunal, it was held, that re-opening of the case was not correct in law inasmuch as there was no fresh information available to the assessee, and mere change of opinion is not information. The Appellate Tribunal and the High Court both said that it was a question of fact. The Supreme Court said that it was a question of law.

Held, (i) that Section 17 (b) of the Wealth-tax Act, 1957, was in para materia with Section 34 (1) (b) of the Indian Income-tax Act, 1922;

(ii) that after the decision of the Supreme Court in '*Maharaj-kumar Kamal Singh's case, Ref 35 I.T R., page 1(S.C.)*,' it was settled that

“information” in Section 34 (1) (b) of the Indian Income-tax Act, 1922, included information as to the true and correct state of law and so would cover information as to relevant judicial decisions and such information for the purpose of Section 34 (1) (b) need not be confined only to cases where the Income-tax Officer discovered as a fact that income had escaped assessment; and to that extent the decision of the Bombay High Court in ‘*Sir Mahomed Yusuf Ismail’s case*, Ref. 12 I. T. R., page 8,’ had been overruled.

Principle (at page 467) :

There does appear to be divergence of opinion among the High Courts as to the meaning of the word “information” in section 34 (1) (b) of the Income-tax Act, and in view of that divergence we are of the opinion that a question of law did arise in the present case as to the interpretation of the word “information” in section 17 (b) of the Act and should have been referred by the Tribunal.

Case No. 217

Litigation Expenses

Question of law – Litigation Expenses allowed by the Tribunal wrongly.

In C. I. T., West Bengal, v. H. Hirjee, Ref. 23 I.T.R., page 427.

Facts :— Some expenditure was incurred in defending a criminal suit on the charge of profiteering, hoarding and violation of certain laws of the land. He was acquitted of the charge. Expenditure on litigation was allowed as deduction by the Tribunal. The High Court in reference held, that this finding of the Tribunal was a finding of fact.

The Supreme Court reversed the judgment of the High Court on the ground that the claim for the deduction of an expenditure incurred in defending a criminal case, whether such an expenditure is permissible or not, is a question of law. It was not a finding of fact and the High Court had erred, and the Tribunal was not correct in allowing the amount as valid expenditure.

Principles (at page 431) :

1. no question could arise as to the primary or secondary purpose for which the legal expenses could be said to have been incurred as in the case of a criminal prosecution where the defence cannot easily

be dissociated from the purposes of saving the accused person from a possible conviction and imposition of the prescribed penalty.

2. The deductibility of such expenses under Section 10 (2) (xv) must depend on the nature and purpose of the legal proceeding in relation to the business whose profits are under computation, and cannot be affected by the final outcome of that proceeding.

Case No. 218**Partnership Act**

Question of law does arise where Registration of the Firm is not granted and relevant Partnership Act provisions are not applied.

In C. I. T., Punjab, Himachal Pradesh and Jammu & Kashmir v. Chander Bhan Harbhajan Lal, Ref. 60 I. T. R., page 188.

Facts :— One partner took his profits from the firm and sub-divided with others by creating a sub-partnership. The registration was refused by the Revenue authorities. The Supreme Court granted the registration.

Principle of law (at page 197) :

If in the facts and circumstances of the case a question of law arises, there is little doubt that under section 66 (1) the Tribunal is bound to draw up a statement of the case and refer the question to the High Court. The Tribunal has no discretion in the matter. Where, however, the Tribunal refuses to do so and the High Court is moved under section 66 (2) of the Act, the position becomes different. Section 66 (2) confers a discretion on the High Court and if the High Court is of the opinion that though a question of law arises it is not substantial or that it is well settled it can reject the petition. What we have, therefore, to ascertain is whether a question of law at all arises in this case and if so, whether it is a substantial question of law. In order to ascertain whether a question of law arises it is necessary to ascertain the facts which have been found established by the Income-tax authorities.

Case No. 219**Sale Deed**

Question of law – From interpretation of a Sale Deed – Value of Assets.

In Jogta Coal Co. Ltd. v. C. I. T., West Bengal, Ref. 36 I. T. R., page 521.

Facts :— That the appellant purchased in a sale agreement certain assets. The figures mentioned in the sale deed were accepted by the Income-tax Officer as correct value of the break up of assets. He estimated the price of Rs. 7½ lakhs as that of the goodwill though nothing was mentioned about the goodwill in the agreement. The Appellate Assistant Commissioner accepted the assessment order. The Tribunal adopted different figures of the values by their own opinion.

Question was whether the Appellate Tribunal's order was a finding of fact or gave rise to a question of law.

Held, that the questions whether on the interpretation of the sale deed it could be said that any goodwill was purchased by the appellant and whether the Income-tax Officer was competent to go behind the sale deed and adopt his own value for the assets were questions of law which arose out of the order of the Appellate Tribunal.

Case No. 220

Whose Assessment

Sale Profits should be included and whether there was any Material to justify the inclusion of the Amount in the Sale Profits of Bombay buyers is a Question of law.

In Parsram Parumal v. C. I. T., West Bengal, Ref. 44 I. T. R., page 506.

Facts :— The assessee had Head Office in Calcutta, and branch Offices in Bombay and Karachi. He was a dealer in sovereigns and gold. Out of the sovereigns purchased in Bombay, he transmitted to Karachi sovereigns of the value of Rs. 1,66,188/-, and entered it in his account books as commission of Bombay Branch. The Income-tax Officer while applying flat rate, included the amount in the turnover for which the case of the assessee was that it was not sale of Bombay but the goods were transmitted to Karachi.

Held, that there was the question of law whether there was any material to justify the inclusion of the amount in the sales of the Bombay business.

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15

Short Notes on Miscellaneous Subjects

Note 1

Arrest

Where by Fraud tax Payment is avoided

Where there is a device for non-payment of tax and assessee conveniently puts his money in third party's name, warrant of arrest can be issued against him.

In Collector of Malabar & Another v. Erimmal Ebrahim Hajee, Ref. 32 I. T. R., page 124.

Note 2

Assessment order whether Property

In Ishwarlal Girdharilal Parekh v. State of Maharashtra & Others, Ref. 70 I. T. R., page 95.

If the assessee has implied cheating and by dishonest means obtained an assessment order on a figure of income which was false thereby making himself liable for payment of tax which was also wrong it can be said that he had made himself criminally liable because assessment order is a property. The order of assessment does create a right in the assessee in the sense that he has a right to pay tax only on the total amount assessed and his liability to pay tax is also restricted to that extent. Therefore, an order of assessment is also a valuable security under Section 420 of the Indian Penal Code.

Note 3**Burden about Source of Income**

Where it is established by the Revenue authorities that there is income receipt then it is liable to be included in his total income assessed. That from what source it has been earned, it is neither necessary nor relevant.

In C. I. T., West Bengal v. Durga Dutt More, Ref. 69 I. T. R., Short Notes page 47 and C. I. T., Madras v. M. Ganapathi Mudaliar, Ref. 53 I. T. R., page 623.

Note 4**Burden of Proof in a Gift-tax Assessment.**

In Commissioner of Gift-tax, Kerala v. Dr. George Kuruvilla, Ref. 71 I. T. R., Short Notes page 22.

It has been held, that where assessee claims exemption from payment of Gift-tax, burden is upon him to establish necessary facts so that he becomes entitled to the exemption. That it cannot be established by the Revenue authorities or by the Tribunal. Supreme-Court in this case asked for a supplementary statement of the case with the gift deed to be annexed.

Note 5**Compounding of an Offence****Contract once made cannot be re-opened.**

(A) In Shamrao Bhagwantrao Deshmukh v.. The Dominion of India, Ref. 27 I. T. R., page 30.

Where the assessee did not submit the Return himself under his signatures but the Return was submitted under the signatures of the attorney agent, that Return was found to be false. The prosecution was launched upon the assessee for submitting false Return. The assessee compounded the offence by settlement and payment of compounding fee. Subsequently he lodged the matter that he was not liable to pay compounding fee as he did not sign the Return.

Held, that once there was a settlement with the Income-tax authorities, whether it was on account of an offence committed for false Return or for non-submission of Return, the offence once compounded could not be re-opened. At least the assessee could

be prosecuted for non-submitting the Return, and, therefore, the offence was properly compounded.

(B) *In Dewan Bahadur Seth Gopal Das Mohta v. the Union of India & Another*, Ref. 26 I.T.R., page 722.

Where with full knowledge the assessee enters into a contract of settlement and voluntarily offers tax he cannot challenge its payment on the ground that settlement was made under an Investigation Commission Act which was declared ultra vires.

Note 6

Court

Income-tax Officer whether a Court and has Power to prosecute under I. P. C.

(A) *In Balwant Singh & Another v. L. C. Bharupal, Income-tax Officer, New Delhi & Another*, Ref. 70 I. T. R., page 89.

Proceedings before the Income-tax Officer in connection with the registration of the firm are judicial. In that sense it is a court though directly it is not a Revenue court. So it has power to prosecute for an offence committed by an assessee in making false statement and opportunity before launching prosecution is not necessary.

(B) **Income-tax Officer whether Court - Proceedings whether Judicial - Statement recorded by him on Oath if false whether there can be a Criminal Prosecution of the Deponent.**

Held, yes if the Income-tax Officer takes steps in writing.

In Lalji Haridas v. State of Maharashtra & Another, Ref. 52 I.T.R., page 423.

Note 7

Device to Evade-tax

Payment of Compensation to Managing Agents on termination of their Managing Agency.

In Juggi Lal Kamapat v. C. I. T., U. P., Ref. 70 I. T. R., Short-Notes page 39.

Where the compensation was paid by the Company to its managing agents of Rs. 2 lakhs on premature termination of the managing agency and the amount was claimed as a deduction, it was not allowed. The reason was that new managing agents who were appointed in place of the retiring managing agents, were

substantially the same persons but in a different form. Previously it was a firm now it was a Limited Company. Members of the Limited Company were the same as partners of the firm. Thus the payment of Rs. 2 lakhs was nothing but a device for evasion of tax.

Note 8**Disclosure of Primary Facts.**

Where the assessee in the Return or alongwith the Return in the form of statements or otherwise before the assessment has made disclosure to the Revenue authorities transactions of purchase and sale of share he treats them to be investment shares. Original assessment is made without including the profits earned on the sale of these shares. Now the case is re-opened under Section 34 of the Income-tax Act of 1922, within a period of 8 years but after 4 years. Such a re-opening is bad in law because assessee had performed his duty in disclosing primary facts before the assessment was made. Therefore, there was no duty upon him to inform the Department about the inference drawn by those facts. Therefore, there was no failure on the part of the assessee to disclose fully and truly all material facts.

In Calcutta Discount Co., Ltd., v. I. T. O. Companies District I, Calcutta & Another, Ref. 41 I. T. R., page 191.

Note 9**Documents Production**

Evidence Tendered in a case whether can be Summoned by a Court.

(A) *In Charu Chandra Kundu v. Gurupada Ghosh, Ref. 43 I. T. R., page 83.*

Held, the prohibition imposed against the court by Section 54 of the Act of 1922, was absolute; its operation was not obliterated by any waiver by the assessee in whose assessment the evidence was tendered, document produced or record prepared.

(B) *In C. I. T., Bombay v. Laxmichand Narayandas & Another, Ref. 44 I. T. R., page 548.*

That even Criminal courts cannot summon from the Income-tax Officer documents and records which form part of the Income-tax assessment proceedings. There is prohibition to produce documents

and records produced by the assessee before the Income-tax Officer and as well as documents and records produced by the third party.

Note 10**Double-tax**

(A) There is nothing in this act which prohibits the I.T.O. from taxing cash deposit as well as apply flat rate by rejecting the trade-account. Legally this proposition is sound. But factually if assessee can establish the circumstances that it would amount to double tax; both the amounts may not be included. Assessee should discharge the onus and prove the case that it falls under the principle of double taxation.

Refer Case No. 36 & 117 *supra*.

(B) General principle is that there should be no double taxation. The employer making payment of salary to employee does not get deduction then employee is not taxable.

In C. I. T., Bombay City-1 v. E. Francescanto, Ref. 60 I. T. R., page 442.

(C) So also is the rule regarding year of assessment. In one year if income is liable to be assessed but not assessed, it cannot be assessed in the subsequent year as it would result in double tax.

In Laxmipt Singhania v. C. I. T., U. P., Ref. 70 I. T. R., Short Notes page 10.

Note 11**Financial Year****Previous year for Cash Deposit.**

What should be the Previous year for undisclosed source ?

In Baladin Ram v. C. I. T., U. P., Ref. 71 I. T. R., page 427.

Held, that it shall always be financial year unless there is a deposit in the business books which has a different previous year. There is no departure in the Act of 1961 from the principle stated under the Income-tax Act of 1922. Refer Chapter IV *page 93 supra*.

Note 12

High Court's duty is not to sit in Appraisal of the Evidence afresh-Appellate Tribunal's Finding based upon Evidence cannot be disturbed-Deduction of the Amount was not proved to be an Expenditure wholly

laid out for the purpose of Business—Payment of Compensation to outgoing Agents was not allowable Expenditure without Proof or an Agreement.

Where I. C. I. (Export) Ltd. appointed new sole selling agents for distribution of their products and retired four previous selling agents who were paid some compensation by the new sole selling agents, question arose whether the new sole selling agents can claim a deduction of that amount which was payable by them to the ex-agents. The payment on certain basis was claimed as a deduction by the new sole selling agents who had created in their account books a reserved account on the ground that it was a payment to be made by them under a superior title. That agreement under which such a payment was claimed as deduction was not in writing. Evidence given before the Appellate Assistant Commissioner in appeal or in the Tribunal was not accepted by the Appellate Tribunal. The High Court re-examined the whole evidence and came to the conclusion that deduction was allowable and the Tribunal was in error in disallowing deduction. The Supreme Court came to the conclusion that the High Court was in error in sitting in a advisory jurisdiction and going into the question of evidence afresh. There was no proof that expenditure was laid out wholly and exclusively for the purpose of business of the new sole selling agents and the finding of the Appellate Tribunal was the finding of fact based upon materials and could not be rejected.

In Yogendra Nath Naskar v. C. I. T., Calcutta, Ref. 72 I. T. R., Short Notes page 5.

Note 13

Hindu undivided family—Non Resident

In C. I. T., Bombay City v. Nandlal Gandlal, Ref. 40 I. T. R., page 1.

Where Hindu undivided family is non-resident but its Karta and members join partnership in British India, it cannot be said that family has become resident unless it can be proved that it had control and management over the partnership affairs.

Note 14

Husband & Wife

(A) Where a husband under a deed of settlement declares a

dividend income to be handed over to his wife in consideration of love and affection; over which wife has full power of disposal.

Held, that it was a case of application of an income after it was earned. So husband was liable to be assessed on wife's dividend income.

In Provat Kumar Mitter v. C. I. T., West Bengal, Ref. 41 I.T.R., page 624.

(B) Similarly where share in a firm is assigned by the husband in favour of his wife and minor daughter that share income should be included in the husband's assessment.

In K. A. Ramachar & Another v. C.I.T., Madras, Ref. 42 I. T. R., page 25.

Note 15

On the following facts it was held by the Supreme Court that firm, individual and minor constitute an association of persons where partition had occurred.

Extract from the judgment of 67 I. T. R., page 116-17 reproduced below :

"In the case before us, there is abundant material to prove that Meyyappa (I), his minor son, Chettiappa, and M.S.M.M. firm formed an association in the year 1952-53 to 1956-57. To review the relevant facts the "M. M. Ipoh properties" which were allotted to Meyyappa (I) at the partition in 1940 became on the birth of Chettiappa properties of a coparcenary, and it is common ground that Chettiappa acquired a share in the income which Meyyappa (I) received from the M. S. M. M. firm; the "M. M. Ipoh properties" were used in a trading venture and were managed by the M.S.M.M. firm : the selling agency was common between M. S. M. M. firm and "M. M. Ipoh"; the stocks and expenditure of the M. M. Ipoh firm were not separately determined; and common books of account were maintained for the management of the M. M. Ipoh properties and the M. S. M. M. firm dealings.

Alagammal-mother of Chettiappa-had executed the deed of partition dated April 13, 1950, as the guardian of Chettiappa. By the deed she acknowledged having received the share of Chettiappa

in the property. The Tribunal found that the management was entrusted to the M. S. M. M. firm on behalf of "M. M. Ipoh", and that in entrusting the management Alagammal must have given her consent. In paragraph II of the statement of the case, the Tribunal observed:

"The integrity and management of the estates have continued undisturbed right throughout the period, only the holding thereof by various members having changed from time to time. The volition necessary is only all too apparent; the entrustment of the management to M.S.M.M. firm for a proper management implies a prior agreement to which the guardian of the minor must have given her consent too."

In M. M. Ipoh & Others v. C. I. T., Madras, Ref. 67 I. T. R., page 106.

Note 16

Judicial Pronouncement

Where there is a judicial pronouncement deleting income from the assessment that it does not belong to the assessee or to that year and relying upon that judgment as affording piece of information case is re-opened under Section 34 of the Act 1922, within a period of 4 years such a re-opening was considered to be valid.

In R.B. Bansilal Abirchand Firm v. C. I. T., M.P., Ref. 70 I.T.R., page 74.

Note 17

New Question not raised before the Appellate Tribunal nor Answered by the Appellate Tribunal even if covered by the broad Question of law, Answer to that may be refused.

Penalty was imposed upon a firm which was reconstituted as a result of a death of a partner. Subsequently this firm was succeeded to within the meaning of Section 26 (2) of the Income-tax Act, 1922. The penalty was imposed upon the firm for concealment of profits. From the judgment of the Appellate Tribunal High Court hearing the reference held, that penalty could only be imposed upon that firm which was in existence in 1942 when there was concealment of profit. There could be no penalty on the successor firm

within the meaning of Section 44 of the Income-tax Act, 1922. The Supreme Court in appeal held, that Section 44 of the Income-tax Act, 1922, applied only to dissolved firms or discontinued business but did not apply to cases where the firm was reconstituted or succession taken place. Therefore, the basis of the finding of the High Court was erroneous. The question whether the penalty could be imposed upon the partners was not answered by the Supreme Court on the ground that such a question could be answered in view of the broad question referred but they would refuse to answer that question simply on the ground that it was neither argued before the Appellate Tribunal nor raised in the reference.

In C. I. T., Bihar & Orissa v. Kirkend Coal Co., Ref. 72 I. T. R., Short Notes page 13.

Note 18**Opportunity—Penalty**

Held, once a notice enunciating penalty proceedings were legal. It did not cease to be so merely on the ground that Appellate Assistant Commissioner had set aside the order for reasons of lack of opportunity. In other words the proceedings can still be continued on the basis of the old notice.

In Guduthur Bros. v. Income-tax Officer, Special Circle, Bangalore, Ref. 40 I. T. R., page 298.

Note 19**Partnership Rule for Registration**

In Parekh Wadilal Jivanbhai v. C. I. T., Madhya Pradesh, Nagpur & Bhandara, Ref. 63 I. T. R., page 485.

Claim was put up for registration and there were certain clauses in the deed by which the profit and loss to be shared between the partners were defined. That in the account books profits and losses were duly entered into according to the shares defined in the deed of partnership. Application was signed by all the partners entering into the contract of partnership. Because of the adjustment of profits in the account books and suitable entries made, Supreme Court observed to say that the deed, and the clauses of the partnership deed, must be reasonably interpreted with reference to the application filed for the purposes of registration. In this case registration was allowed.

Note 20**Rule of Natural Justice****Opportunity must be given and suspicion must be avoided.**

The following is the passage regarding this rule agreeing in the judgment of '*Dhakeswari Cotton Mills Ltd. v. C.I.T., West Bengal, Ref. 26 I. T. R., page 775.*'

Facts :— Facts are discussed in Case No. 150.

Principle (at page 782-83) :

As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making the assessment under sub-section (3) of Section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23 (3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of 'Seth Gurmukh Singh v. Commissioner of Income-tax, Punjab, Ref. 12 I. T. R., page 393,'

In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing.

Note 21**Service of Notice**

Conditions regarding Service of Notice – Duty of the Serving Officer – Nature of Evidence necessary to hold that there has been proper Service

In G. I. T., Kerala v. Thayaballi Mulla Jeevaji Kapasi, Ref. 66 I. T. R., page 147.

Principles of law (at page 153) :

It must be shown not only that the serving officer went to that place at a reasonable time when he would be expected to be present, but also that if he was not found, proper and reasonable attempts were made to find him either at that address or elsewhere.

Note 22**Substance & Form**

Substance of the Transaction and not the Form. Lease was held to be Trading Profit.

In Karanpura Development Co. Ltd. v. C. I. T., West Bengal, Ref. 44 I. T. R., page 362.

That the assessee company had one of its objects acquiring of lease and sub-letting them. Transactions of such nature resulted in profit.

Question arose whether they are trading profit ?

Held, that they were trading profit because they fell within the object of the company.

Principle (at page 377) :

Ownership of property and leasing it out may be done as a part of business, or it may be done as land owner. Whether it is the one or the other must necessarily depend upon the object with which the act is done.

Note :— The object mentioned in the company's memorandum is a important circumstance for determining the nature of receipt and the purpose for which a transaction is carried out. But merely the object mentioned in the memorandum is not conclusive test in every case.

Note 23**Tribunal's Order**

If not obeyed Writ lies in the High Court.

In Bhopal Sugar Industries Ltd. v. Income-tax Officer, Bhopal, Ref. 40 I. T. R., page 618.

Facts :— Facts show that the assessee, a sugar manufacturing company, claimed that agricultural income should be excluded from his assessment. Agricultural income was that which consisted of the market price of the cane grown on his own farm. The Appellate

Tribunal directed that transportation expenses should also be taken into consideration in determining the market price of the cane which reached the factory. That relief may be given to the assessee accordingly. The Income-tax Officer mis-interpreted the directions of the Tribunal and refused to give the relief legally due. Against this order of the I. T. O. assessee moved application before the Judicial Commissioner for carrying out the directions contained in the Appellate Tribunal's judgment. Judicial Commissioner though dis-agreeing with the order of the I. T. O. subsequently came to the conclusion that relief was not due as in his opinion the judgment of the Appellate Tribunal did not permit the relief to be given.

Writ was moved in the Supreme Court to give effect to the order of the Appellate Tribunal.

Held, that by his letter dated March 24, 1955, the Income-tax Officer virtually refused to carry out the directions which a superior Tribunal had given to him. Such refusal was in effect a denial of justice. The order of the Appellate Tribunal having become final, it was not open to the Judicial Commissioner to hold, that the order was wrong. As the Income-tax Officer had failed to carry out a legal duty imposed on him and such failure was destructive of a basic principle of justice, a writ of mandamus should issue ex debito justitiae to compel him to carry out the directions given by the Appellate Tribunal.

Note 24

Writ

In K. S. Rashid & Son and Others v. Income-tax Investigation Commission & Others, Ref. 25 I. T. R., page 167.

Principles of law (at page 174) :

1.that the remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere.

(at page 173) :

2. There are only two limitation placed upon the exercise of these powers by a High Court under Article 226 of the Constitution; one is that... .., the writs issued by the High Court cannot run beyond the territories subject to its jurisdiction. The other limitation is that the

person or authority to whom the High Court is empowered to issue writs "must be within those territories" and this implies that they must be amenable to its jurisdiction either by residence or location within those territories.

Note 25**Written-down value**

Rule for determining true Relationship and unveiling the Device-Transfer of Assets and Recoupment of Depreciation by the Transferer-Held Taxable.

In C. I. T., Gujarat v. B.M. Kharwar, Ref. 69 I.T.R., Short Notes page 42.

The taxing authority is entitled, and is indeed bound, to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relationship, it is open to the taxing authorities to go behind the apparent affairs and to determine the true character of the relationship. This principle applies alike to cases in which the legal relation is recorded in a formal document and to cases where it has to be gathered from evidence—oral and documentary — and conduct of the parties to the transaction.

Facts :— Where there is a transfer of the assets by the firm to the Limited Company in which the partners of the firm became Share holders or Directors; the excess over the written-down value will be profit of the firm taxable.

Even under the "realisation of sale", the excess over the written-down value not exceeding the difference between the original cost and the written-down value is liable to be brought to tax. True nature of the transaction must be determined.

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